

# STANDING TO SUE: LESSONS FROM SCOTLAND'S *ACTIO POPULARIS*

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## ABSTRACT

*Much of what we think we know about the nature of judicial power in the early Republic comes from the history of English common law. Our focus on the common law seems natural enough: Blackstone's Commentaries on the Laws of England shaped many an antebellum lawyer's notion of legal practice, and jurists in the twentieth century quite deliberately pointed to the courts at Westminster when discussing the origins of judicial power in America.*

*An emerging body of scholarship has come to question this single-minded focus. Litigation in eighteenth-century America was an eclectic affair, also drawing on the practices of the courts of equity and admiralty, which relied on Romano-canonical alternatives to the common law writ system. Recognizing an inquisitorial role for judges and often relaxing strict adversary requirements in the issuance of investitive decrees, these courts registered legal claims and tested the boundaries of official authority.*

*This Article examines the rules of standing to sue that emerged from one important court's reliance on civil law modes of practice. The Scottish Court of Session heard cases in both law and equity and, early on, developed a declaratory practice that allowed litigants to test their rights in a setting where no coercive judgment was contemplated. While in private litigation the Scots imposed standing limits—or what the*

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*Court of Session referred to as title and interest to sue—they also permitted individuals to bring an actio popularis, or popular action, in certain circumstances. The Scottish actio popularis allowed individual suitors to press legal claims held in common with other members of the public. By offering an account of Scots practice, this Article illuminates a remarkably mature but long-ignored body of standing law. In doing so, it draws upon Scottish ideas to explore the origins of modern standing law in the United States, the viability of claims asserting generalized grievances, and the importance of representational adequacy and nonparty preclusion to a full understanding of public law litigation.*

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*[In assessing a litigant's title and interest to sue, t]he interest of ambition, of revenge, or of any other passion that is not lucrative, is totally disregarded.*

—Henry Home, Lord Kames (1777)<sup>1</sup>

*[In evaluating taxpayer standing,] Wallet Injury is . . . concrete and particularized [but] Psychic Injury . . . consists of the taxpayer's mental displeasure [and] "does not state an Article III case or controversy."*

—Justice Antonin Scalia (2007)<sup>2</sup>

## INTRODUCTION

The Supreme Court of the United States characterizes itself as bound by the case-or-controversy requirement of Article III of the Constitution, a requirement it defines and justifies in part by reference to English legal history. Thus, Justice Felix Frankfurter, an influential twentieth-century proponent of standing limits, invoked the English judicial system in explaining that the federal “[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”<sup>3</sup> As elaborated over the ensuing decades, the case-or-controversy requirement has been said to encompass a range of familiar justiciability limits, including the idea that only plaintiffs with standing can invoke the judicial power<sup>4</sup> and only in the context of a live dispute between

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1. HENRY HOME, LORD KAMES, *ELUCIDATIONS RESPECTING THE COMMON AND STATUTE LAW OF SCOTLAND* 214 (Edinburgh, W. Creech & T. Cadell 1777).

2. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619–20 (2007) (Scalia, J., concurring) (quoting *Lance v. Coffman*, 549 U.S. 437, 439 (2007)).

3. *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). *See generally* RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 151 n.6 (7th ed. 2015) (characterizing Frankfurter's “influential” opinion in *Coleman v. Miller* as one that has “framed subsequent analysis”).

4. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109–10 (1998) (concluding that citizen-suit plaintiffs lacked standing to challenge alleged violations of federal environmental statutes); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (denying standing in a citizen-suit claim against the federal government); *cf. Allen v. Wright*, 468 U.S. 737, 760–61 (1984) (concluding that parents of African American schoolchildren lacked standing to compel the Internal Revenue Service to deny a tax exemption to racially discriminatory private schools). For a discussion of the particulars of the injury-in-fact prong of the standing inquiry, see Richard M. Re, *Relative Standing*, 102 *GEO. L.J.* 1191, 1194–95 (2014). Professor Richard Re quotes decisional law that requires the plaintiff's injury to be “‘tangible,’ ‘specific,’ ‘present,’ ‘perceptible,’ and ‘palpable.’” *Id.*

adverse parties.<sup>5</sup> But the connection to England remains. Justice Scalia upheld *qui tam* litigation in part on the strength of historical analogy<sup>6</sup> and later invoked the practice of our “English ancestors” in the course of a spirited dissent from the exercise of judicial power in a context he viewed as insufficiently adversarial.<sup>7</sup>

Scholars have debated the Court’s proffered historical justification for standing law. In an important set of papers that appeared just as public law litigation was gaining momentum,<sup>8</sup> Professors Louis Jaffe and Raoul Berger argued that the King’s Bench permitted “strangers”—those without a personal stake—to pursue such prerogative writs as mandamus, prohibition, and certiorari.<sup>9</sup> In addition, scholars identified *qui tam* actions brought on behalf of the public by bounty-seeking informers and relators as exemplars of public law litigation that went forward in English and early American courts without an injured party at the helm.<sup>10</sup> Many scholars agree that the

5. See *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (“At bottom, ‘the gist of the question of standing’ is whether petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.’” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

6. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–78 (2000) (acknowledging the use of informer suits in eighteenth-century England, and in the federal courts of the early Republic, as a key factor in the Court’s finding that such proceedings were proper subjects of federal judicial cognizance).

7. *United States v. Windsor*, 133 S. Ct. 2675, 2699–700 (2013) (Scalia, J., dissenting) (arguing that the agreement between Windsor and the government as to the constitutional invalidity of the federal law at issue deprived the Court of power to reach the merits); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2694 (Scalia, J., dissenting) (arguing that the “judicial [p]ower” with which the framers entrusted Article III courts “was the judicial power they were familiar with—that traditionally exercised by English and American courts”).

8. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288–89 (1976) (tracing the rise of a distinctive form of litigation in public law matters).

9. See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819–21, 825 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1274 (1961) [hereinafter Jaffe, *Standing to Secure*]; Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1035 (1968) [hereinafter Jaffe, *Citizen Litigant*].

10. Scholars agree that England recognized informer and relator actions in which individuals sought relief on behalf of the Crown or the public. See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341–44 (1989) (tracing the history of *qui tam* litigation in England and the United States); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1406–09 (1988) (discussing *qui tam* and informer suits, in which plaintiffs seek to recover a bounty rather than redress a personal injury); cf. Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 175–77 (1992) (arguing that *qui tam* litigation, such as that brought under the federal False Claims Act, disproves the injury-in-fact gloss on Article III standing). See generally *Stevens*,

Court's case-or-controversy limits were a twentieth-century invention of the federal judiciary, rather than a recognized feature of nineteenth-century conceptions of the judicial power.<sup>11</sup>

More recent scholarship questions these conclusions,<sup>12</sup> arguing that history does not defeat standing doctrine.<sup>13</sup> Building on the distinction between public and private actions, Professors Ann Woolhandler and Caleb Nelson argue that nineteenth-century courts had imposed important limits on the ability of private individuals with no personal stake to appear on behalf of the public to litigate public harms.<sup>14</sup> The tradition of *qui tam* litigation in this telling represents only a modest departure from the dominant view that matters of public right were to be handled by officials of the government.<sup>15</sup> English law, particularly as restated in Blackstone's *Commentaries*,<sup>16</sup> figures prominently on both sides of these questions.

529 U.S. at 773–75 (upholding, in part on historical grounds, the right of an informer to pursue claims for a penalty as the assignee of the government's injury-in-fact).

11. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996) (describing the rise of standing law in the twentieth century and attributing it to Justice Frankfurter's efforts to protect the New Deal from excessive judicial oversight); see also Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 637–39 (1992) (similarly tracing the rise of standing law to the New Deal period); cf. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1004 (2002) (describing the Court's standing analysis as “a judicially invented gloss on the Constitution”).

12. For example, Brad Clanton argues that many of the so-called strangers involved in supervisory writ proceedings were actually interested parties. See Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1010 (1997).

13. See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004).

14. Thus, America early abandoned the English idea of private criminal prosecutions: the Judiciary Act of 1789 vested the prosecutorial power in officers of the executive branch of the federal government. *Id.* at 695–701; cf. Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2249–50 (1999) (observing that government-initiated criminal prosecutions do not seek redress for an injury in fact). Mandamus practice evolved, at least in some states, to prevent private parties with no concrete interest from pursuing claims against public officials. Woolhandler & Nelson, *supra* note 13, at 709 (stating that as of 1834, the “general rule” of Massachusetts permitted a private individual to apply for a writ of mandamus “only in a case where he has some private or particular interest to be subserved” (quoting *In re Wellington*, 1834 WL 2806, at \*12 (Mass. Oct. 1, 1834))).

15. See Woolhandler & Nelson, *supra* note 13, at 725–32 (describing such actions as relatively uncommon; as largely the product of a single statute; and as creating problems of arbitrary, oppressive, and duplicative enforcement).

16. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765). See, e.g., Clanton, *supra* note 12, at 1012–14 (invoking Blackstone); Woolhandler & Nelson, *supra* note 13, at 693 nn.13, 15 & 16, 695–96 nn.22–25, 700–01 (relying on Blackstone).

An emerging body of scholarship contests this single-minded focus on the law of England as the only source of insight into conceptions of the judicial power in the early Republic.<sup>17</sup> Scholars have questioned the adversarial assumptions that inform traditional accounts of the nature of the judicial function in the United States;<sup>18</sup> they have argued that Romano-canonical modes of inquisitorial practice characterized a wide range of federal judicial proceedings;<sup>19</sup> they have argued that Scottish legal architecture, with its supreme Court of Session, may have provided one important model for the hierarchical structure of the federal judicial system;<sup>20</sup> and they have challenged both the injury-in-fact and adverse-party elements of modern standing law.<sup>21</sup> Efforts to recover a better understanding of the broad-gauged nature of America's legal inheritance continue on many fronts.<sup>22</sup>

Working within this expanded scholarly framework, this Article explores a surprisingly mature but wholly neglected body of standing law; that which governed practice in the eighteenth-century Scottish Court of Session. The Court of Session served as Scotland's highest court in civil law matters, it exercised broad original and appellate

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17. See generally ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 24–29, 87–88, 120–24 (2010) (emphasizing Scottish influence on American constitutionalism).

18. On the importance of inquisitorial models in the early years of the Republic, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1204–08 (2005). A good deal more has been written about the rise of adversary criminal procedure than of adversary civil procedure. See, e.g., JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 496, 499 (1990).

19. See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1410–13 (2015) [hereinafter Pfander & Birk, *Non-Contentious Jurisdiction*] (describing a range of non-contentious features of legal practice in the early Republic and arguing more generally that such forms of practice were an understood feature of proceedings before equity, admiralty, and church courts).

20. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1621 (2011) [hereinafter Pfander & Birk, *Scottish Judiciary*] (identifying the Scottish Court of Session as the supreme civil court of Scotland and as a possible model for the “one supreme Court” identified in Article III).

21. See Pfander & Birk, *Non-Contentious Jurisdiction*, *supra* note 19, at 1451–55 (observing that federal judicial power extends without any showing of injury to a wide range of applications to register claims of right in the context of non-contentious jurisdiction, such as claims to naturalized citizenship).

22. See William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1106 (2010); see also Pfander & Birk, *Scottish Judiciary*, *supra* note 20, at 1631–42 (discussing the influence of Scottish ideas and origins in eighteenth-century America).

jurisdiction, and it presided over suits in law and equity.<sup>23</sup> By the eighteenth century, the Court of Session had long entertained what we describe today as “public law” litigation<sup>24</sup>—that is, suits brought to declare and clarify the commonly held or public rights of individuals in cases in which government bodies appeared as interested parties.<sup>25</sup>

The practice of the Court of Session thus offers an overlooked but potentially valuable source of historical and comparative insight into the law of standing that later came to define and constrain the work of courts in the United States. For starters, the Scots developed a set of rules that would govern the standing of parties in the ordinary course of private litigation. The Court of Session framed this standing inquiry in terms of the plaintiff’s (or pursuer’s) “title” and “interest” to sue.<sup>26</sup> To pursue a claim, plaintiffs were required to show that they had both an interest in the relief being sought and title to pursue the claim. Not everyone with an interest (or something to gain) could initiate an action; instead, Scots law limited access to those interested pursuers with title, a concept that restricted suit to those with a clear legal right to pursue the claim.<sup>27</sup> As a general matter, then, Scots private law ruled out third-party standing for those seeking to enforce the rights of another party, or what the Scots called (following Roman law) *jus tertii*.<sup>28</sup>

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23. On the origins and jurisdiction of the Court of Session, see *infra* Part I.A.

24. See Chayes, *supra* note 8, at 1302 (highlighting the more active, inquisitorial role of the judge in public law proceedings as compared to the more passive dispute-resolving role of the judge in private law litigation). On the key elements of public law litigation, see *Steffel v. Thompson*, 415 U.S. 452, 463–65 (1974). *Steffel* identifies federal question jurisdiction under 28 U.S.C. § 1331, constitutional tort claims under 42 U.S.C. § 1983, and officer suability under *Ex parte Young* as the cornerstones of modern public law litigation. *Id.*

25. See R.S., *The Scotch Action of Declarator*, 10 LAW MAG. 173, 194 (1859) (describing the Scots’ declarator and distinguishing Blackstone’s emphasis on the importance of adversaries from the Scottish ideas of John Erskine, who saw the need for a declaration of rights before they were denied or called into question). On the willingness of the Scots to allow private parties to interplead with the Crown, see J.D.B. Mitchell, *The Royal Prerogative in Modern Scots Law*, in PUBLIC LAW 304, 304 (J.A.G. Griffith ed., 1957). J.D.B. Mitchell traces the suability of the Crown in Scotland to legal developments in the 1540s. *Id.* Lord Kames characterized as an “established maxim, that the King, with whom the executive part of the law is trusted, has no part of the judicative power.” HENRY HOME, LORD KAMES, HISTORICAL LAW TRACTS 308 (Edinburgh, Bell & Bradfute, 4th ed. 1792).

26. KAMES, *supra* note 1, at 213, 216. Modern sources largely echo Lord Kames in defining title and interest. See, e.g., MUNGO DEANS, SCOTS PUBLIC LAW 170 (1995) (describing title and interest to sue as common law principles synonymous with standing or *locus standi*).

27. See *infra* Part I.B.1.

28. KAMES, *supra* note 1, at 214.

Despite these ordinarily applicable standing limits, Scots law recognized an exception to the requirements of title and interest when the pursuer brought a “popular action,” or what the Scots referred to (following Roman law) as an *actio popularis*. The *actio popularis* authorized any person to pursue a claim on behalf of the public in cases in which a public delict or wrong might otherwise go unredressed.<sup>29</sup> The Scots version of the *actio popularis* empowered an individual (a pursuer) to mount a claim for relief, often an action for a declaratory judgment, when the defendant (a defender, which was often a public body) had impinged on rights held in common by a variety of individuals.<sup>30</sup> None of the pursuers had a clear title to sue in cases of such widespread and somewhat diffuse injury, yet the Court of Session formulated rules enabling one or more of them to pursue the claim in order to avoid a defect of justice. The conception of the Court of Session as a court of equity, exercising powers of *nobile officium* (the power to hear claims of injustice in the last resort when other remedies prove inadequate), played a prominent role in justifying such *actio popularis* proceedings in the eighteenth century.<sup>31</sup> Indeed, in working

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29. See *infra* Part I.B.2.

30. As one early twentieth-century source notes:

Members of the public, or members of particular sections of the public, have in certain cases a right to sue actions as such. An action brought by a pursuer in his capacity as a member of the public is known as an *actio popularis*, and such action is available for the vindication or defence of a public right. Thus any member of the public has a title to sue for declarator of a public right of way, a right of market, a declarator that the navigation of a public navigable river should not be obstructed, a declarator of common use and enjoyment by the public of a piece of land, for removal of a public danger, or nuisance, or to prevent the building of a bridge across a public street by proprietors on opposite sides of the street, and the like.

1 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND 85–86 (John L. Wark & A.C. Black eds., 1926) (footnotes omitted).

31. The Court of Session took an extremely broad view of its *nobile officium*, or equitable power, to depart from the strict mandates of the law and proceed according to what it considered “just[] and fit.” GEORGE MACKENZIE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 233–34 (London, A. Bell & J. Luntley 1694) [hereinafter MACKENZIE, 1694]. *Nobile officium* came into play in cases in which “the Law behaved to trust the Discretion and Honesty of the Judge, since all Cases could not be comprehended under known Laws.” GEORGE MACKENZIE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 201 (Edinburgh, Watson, 4th ed. 1706) [hereinafter MACKENZIE, 1706]. In cases in which law did not provide an established remedy or was otherwise inadequate, the Court of Session had “recourse from strict law to equity, even in the matter of judgment; and in more cases they may recede from the ordinary form and manner of probation, whereof there are many instances commonly known.” JAMES DALRYMPLE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 570 (Edinburgh, G. Hamilton & J. Balfour, 3d ed. 1759). *Nobile officium* was exclusive to the Court of Session, *id.*, having been conferred by the king’s injunction that the Court was to “examine, conclude, and finally determine all and sundry complaints, causes and quarrels that may be determined before the King and his Council,” *id.* at 546; see also KAMES, *supra* note 25, at 232 (declaring that the *nobile officium* authority of the Court of Session came



to prevent a failure of justice, the Court of Session seems to have recognized that the rules of standing applicable to private litigation must give way to allow public actions to proceed.

Scots law paid particular attention to the rights of both pursuers and defenders. The insistence on title and interest to sue was framed less as a restriction on the power of the Court of Session itself than as an important protection for the rights of defenders.<sup>32</sup> The Scots understood that a variety of parties could have an interest in pursuing public actions. The Court of Session thus sought to forestall the potential unfairness that would result to defenders if forced to defend a series of lawsuits seeking essentially the same relief. In private litigation, title and interest to sue served to identify a pursuer well positioned to assert the claim in question. By according qualified *res judicata* effect to that disposition, the Court of Session could limit the number of contests and provide a measure of repose for defenders.<sup>33</sup> In cases where no single pursuer could be said to enjoy clear title to sue, as with an *actio popularis* proceeding, the Court of Session sought a middle way that would facilitate a test of legality and afford defenders some relief from *seriatim* litigation.<sup>34</sup>

Interesting in their own right as illustrations of Roman and civil law approaches to the problem of standing doctrine, these features of Scots practice also offer historical and comparative lessons to students of justiciability law in the United States. The Scottish insistence on title and interest to sue in private actions provides an early precursor and obvious analog to the law of standing as it later developed in the courts of the United States. It thus offers some support for those who argue that standing limits were embodied in eighteenth-century conceptions

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from a grant from the Crown). For a modern account of the origins and current application of the *nobile officium*, see STEPHEN THOMSON, *THE NOBILE OFFICIUM: THE EXTRAORDINARY EQUITABLE JURISDICTION OF THE SUPREME COURTS OF SCOTLAND* 6–17 (2015). Thomson reviews historical accounts of the origins of what he describes as an equitable jurisdiction and attributes it partly to the court's broad supervisory powers and partly to its assumption of powers previously exercised by the privy council. *Id.*

32. See *infra* Part I.B.1.

33. In Scotland, *res judicata* was broadly defined as follows:

The question as to what sentences possess the character of *res judicata* is frequently one of great nicety, but it may be stated broadly at the outset that the requisites of a plea of *res judicata* are (a) a proper previous determination of the subject in question; (b) the parties to the second cause must be identical with, or representative of, the parties to the first cause, or have the same interests; (c) the subject-matter of the two actions must be the same; and (d) there must be identity of grounds of action in law or in fact.

12 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND, *supra* note 33, at 550.

34. See *infra* Part I.B.3.

of the judicial power. Yet, Scots practice accepted the propriety of public actions in some circumstances. Recognition of the Roman *actio popularis* provides an intriguing exception to the principle that pursuers must show both title and interest to sue. While the Court of Session did not conceptualize the proceedings as what we moderns describe as “generalized grievances,”<sup>35</sup> the Scots incorporation of Roman law lends a measure of universality to the argument for some relaxation of strict standing rules in public actions. Courts of equity, acting in the last resort, feel some pressure to interpose against public injustice.

Although discussions of international litigation occasionally refer to the Roman-law construct of the *actio popularis*,<sup>36</sup> it has played essentially no role in assessments of the historical foundations of standing law in the United States.<sup>37</sup> Perhaps an outgrowth of the Supreme Court’s own emphasis on practice in the English courts at Westminster, this gap in the literature leaves part of the history of standing untold. After all, the world in which the lawyers of the founding generation read and practiced law extended well beyond Westminster to the civil law-inflected practice of the ecclesiastical courts and the courts of admiralty.<sup>38</sup> Like the Court of Session, these courts featured Romano-canonical modes of practice and employed

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35. This term first turned up in an unlikely setting. In the course of approving a limited form of taxpayer standing, the Supreme Court disclaimed the notion that it was thereby encouraging the litigation of generalized grievances. See *Flast v. Cohen*, 392 U.S. 83, 106 (1968); cf. H.C.J. 910/86 *Ressler v. Ministry of Defence* 42(2) PD 441, 442 (1988) (Isr.) (translation available at <http://versa.cardozo.yu.edu/opinions/ressler-v-minister-defence> [<https://perma.cc/7Y24-SCQM>]) (suggesting that, in the course of approving a broad conception of standing, the High Court of Justice was nonetheless stopping short of accepting the *actio popularis*). Although it began as a rhetorical flourish, the ban on generalized grievances has reportedly evolved into a constitutional limit on judicial power. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

36. For references to *actio popularis* in discussions of international human rights law, see generally William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353; Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes*, 35 NEW ENG. L. REV. 265 (2001); Egon Schwelb, *The Actio Popularis and International Law*, 2 ISR. Y.B. ON HUM. RTS. 46 (1972). Cf. S.M. THIO, *LOCUS STANDI AND JUDICIAL REVIEW* 4–5 (1971) (distinguishing private litigation to vindicate a personal interest or claim from a public action or *actio popularis*, which cements the judiciary’s role in vindicating the general interest of the public in the legality of legislative and administrative action).

37. One searches in vain for a discussion of the *actio popularis* in the literature on standing and the history of Article III.

38. See Pfander & Birk, *Non-Contentious Jurisdiction*, *supra* note 19, at 1414–16.

attorneys (or proctors) who were educated in civil law.<sup>39</sup> To portray Founding-era conceptions of the adjudicative process, one must include both the bold colors of the common law and the shades and contrasts supplied by practice in the civilian courts and the Scottish Court of Session.<sup>40</sup> Indeed, English common law practice in *qui tam* litigation may owe an undertheorized debt to the forms and modes of the civilians.<sup>41</sup>

Apart from filling out our understanding of the Founding era's legal inheritance, Scots law may offer comparative lessons. Much has been said in the United States about whether to make the standing inquiry part of an evaluation of the merits of the plaintiff's claim or to preserve it as a threshold inquiry separate from the merits.<sup>42</sup> Indeed, one can understand the Supreme Court's recent decision in *Lexmark International, Inc. v. Static Control Components, Inc.*<sup>43</sup> as a partial vindication of the suggested integration of the two inquiries.<sup>44</sup> The

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39. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 169–72 (4th ed. 2002) (describing the university education of civil lawyers, practicing in the courts of admiralty at Doctor's Commons); cf. 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d. ed. 1922) (describing the education of the common lawyers at the Inns of Court).

40. American lawyer Nathan Dane followed Blackstone in defining the civil law as the “municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digests of the emperor Justinian.” 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 377 (Boston, Cummings, Hilliard & Co. 1823). Dane included admiralty courts and ecclesiastical courts as among those that followed Roman law. *Id.* at 376–77.

41. As noted above, the medieval tradition of informer and *qui tam* litigation in England has figured prominently in scholarly debates over the legitimacy of standing limits in the United States. See *supra* note 10. That tradition may have its roots in Roman law. Indeed, Blackstone describes the proceedings in question as “popular actions,” implying that he perceived a connection to Roman precursors. Blackstone explained, “But, more usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general.” 3 BLACKSTONE, *supra* note 16, at \*161. Blackstone also drew on Roman law in concluding that priority attached to the first such action brought and that the judgment in such an action was a bar to subsequent proceedings for the same wrong. See *id.* at \*162 (explaining the system of priority and identifying Roman law as the basis for England's practice of denying preclusive effect to collusive popular action proceedings). See generally J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Litigation*, 78 N.C. L. REV. 539, 566 n.124 (2000) (tracing the origins of the informer action to Roman law).

42. See generally William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (arguing against the use of standing doctrine as a threshold inquiry separate from the merits). See also Heather Elliott, *The Structure of Standing* at 25, 65 ALA. L. REV. 269, 270–71 (2013) (embracing and celebrating Fletcher's suggestion).

43. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

44. See *id.* at 1387 (recharacterizing the zone-of-interests inquiry as a matter of statutory interpretation, casting doubt on the viability of prudential standing doctrines, and suggesting that standing limits must be grounded in either constitutional or statutory interpretation). Although

Scots conducted a threshold standing inquiry that was independent from the merits determination.<sup>45</sup> Under the Scots law of *res judicata*, a dismissal for lack of title and interest was not viewed as an adjudication of the merits of the underlying claim and thus left other interested litigants free to pursue the claim. Students of standing law in the United States may learn a thing or two from the Scots' attention to rules of preclusion.<sup>46</sup>

Practice in Scotland may also enrich debates over the timing of standing's emergence in the courts of the United States. Scholars generally agree that standing law took root in the decisional law of the Supreme Court sometime during the 1920s and 1930s.<sup>47</sup> In explaining the rise of standing law, some accounts emphasize progressive politics and the rise of the administrative state.<sup>48</sup> Professor A.J. Bellia argues, somewhat by way of contrast, that the joinder of law and equity and the recognition of a single form of action under the 1938 Federal Rules

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at one time the prudential standing doctrine operated as a jurisdictional limit, the now-reconfigured zone-of-interests analysis goes to the statute's interpretation and to the legal viability of the plaintiff's claim on the merits. *See id.* at 1387 n.4 (distinguishing questions of the validity of a cause of action on the merits, a matter controlled by the statute, from the jurisdictional inquiry into the power of the court to adjudicate).

45. To forestall *seriatim* litigation, the Court of Session ascribed preclusive effect to the first merits disposition reached in an action brought by a party with title and interest to sue. Two corollaries followed. First, defenders could invoke *res judicata* as a bar to a second proceeding only when an unsuccessful first action had been brought by a party with title and interest to sue. *See infra* Part I.B.3. Second, defenders could seek dismissal of the first proceeding if they were being prosecuted by parties who lacked title and interest to sue; otherwise, defenders would face the prospect of a second or successive proceeding brought by the "entitled" party. *See infra* Part I.B.1.

46. Scholars in the United States have begun to attend more closely to preclusion law. *See* Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 643–44 (2015) (recognizing that an action brought by a plaintiff on behalf of the government may bar subsequent government litigation).

47. *See* Winter, *supra* note 10, at 1375–76, 1450–52 (describing a 1922 decision by Justice Brandeis as the first modern standing decision but tracing the birth of standing to the subsequent work of Justice Frankfurter in such cases as *Coleman* and *Joint Anti-Fascist League*); *see also* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 452–57 (1994) (tracing the rise of standing and other justiciability doctrines in the twentieth century); Winter, *supra* note 10, at 1455–57 (describing the rise of standing law as the result of a concerted effort by liberal Justices to avoid substantive due process claims).

48. *See* Fletcher, *supra* note 42, at 225–28 (arguing that standing law began after 1923, with the rise of the administrative state and the growth in public law litigation to articulate constitutional values); Pushaw, *supra* note 11, at 458–63 (assigning Justice Frankfurter responsibility for transforming standing law into a constitutional limit); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 350 (1995) (tracing justiciability limits to the New Deal period and the full emergence of standing doctrine to developments during the Burger and Rehnquist Courts).

of Civil Procedure may explain why federal courts were obliged to fashion standing-law limits.<sup>49</sup> Such limits would, on Bellia's account, do the work once performed by common law pleading forms.<sup>50</sup> By emphasizing the importance of articulating judicial limits on an otherwise far-reaching equitable power to declare the law, the Scots experience extends Bellia's account by identifying factors that may have led to the rise of standing law in the United States *before* 1938.

Two changes in particular brought practice in the United States more closely into line with that in Scotland: the 1908 judicial recognition in *Ex parte Young*<sup>51</sup> of a party's right to enjoin threatened state violations of the federal Constitution and the 1875 legislative conferral of general federal question jurisdiction on the federal judiciary, the foundation for such litigation.<sup>52</sup> By enabling new forms of equitable interposition, these developments freed the federal courts to some extent from the common law writ, code, and equitable pleading systems and the limits such pleading systems had necessarily imposed on the right of plaintiffs to pursue judicial remedies.<sup>53</sup> Both developments were in place by the early twentieth century, thereby

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49. See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 825–26 (2004) (“Most forms of proceeding and writs were unavailable to persons who had suffered no injury in fact from a legal violation. Other forms of proceedings and writs may have been available to non-injured-in-fact persons in certain circumstances, but at most to the limited extent that that form of proceeding or writ was available to anyone.”); cf. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–68 (1973) (identifying the private rights model as a precursor to standing law); Woolhandler & Nelson, *supra* note 13, at 693–94 (emphasizing the primacy of the private litigation model as the measure of standing law).

50. See Bellia, *supra* note 49, at 828 (arguing that standing represents an attempt to distill certain limits from pre-rules-based forms of proceedings on the otherwise unbridled “one form of action” in the federal rules).

51. *Ex parte Young*, 209 U.S. 123 (1908).

52. See generally *id.* (recognizing the right of an individual or firm to seek federal injunctive relief against a state official's threatened violation of a federal constitutional right). Congress conferred a general grant of federal question jurisdiction in 1875, authorizing the lower federal courts to hear “cases arising under” the Constitution, laws, and treaties of the United States. See Act of March 1, 1875, 18 Stat. 335–37; FALLON, *supra* note 3, at 781–82. By 1934, a third element had joined the earlier two: the Declaratory Judgment Act became law, in part through the advocacy of Edwin Borchard, who specifically invoked the Scottish experience in urging its adoption in the United States. See generally Edwin M. Borchard, *The Declaratory Judgment: A Needed Procedural Reform*, 28 YALE L.J. 105 (1918) (tracing the Scottish declaratory-judgment proceeding to precursors in French and Roman law and noting its adoption in England in 1852). For the current text of the Declaratory Judgment Act, see 28 U.S.C. §§ 2201–2202 (2012). See generally FALLON, *supra* note 3, at 837–38 (offering a brief history of declaratory litigation in the United States).

53. For an explanation of *Ex parte Young*'s departure from existing models of equitable interposition, see James E. Pfander & Jessica Dwinnell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 214 & n.237 (2016).

setting the stage for the broad assertion of constitutional claims that prefigured the Court's use of standing as a restriction on access to judicial review. Well known as a general matter, these two developments may deserve a more prominent place in discussions of the rise of standing law in the courts of the United States.<sup>54</sup>

In suggesting that Scots standing law may offer comparative and historical insights into practice in today's federal courts, this Article makes no claim that Scots law was directly transplanted into American practice or that it decisively shaped the original understanding or meaning of Article III of the Constitution. Although Lord Kames, one of the eighteenth century's best-known judges of the Scottish Court of Session, was known to have argued for joinder of law and equity, and although admiralty law relied on Romano-canonical forms of practice, I have found little indication that the courts of the early Republic routinely turned to Scots law to define judicial practice.<sup>55</sup> Indeed, state reception statutes often called for the application of English common law as the rule of decision, except where incompatible with local circumstances.<sup>56</sup> Scots law thus had less impact on the workaday world of the lawyers of the early Republic than did the ubiquitous *Commentaries* of Blackstone.<sup>57</sup> Nonetheless, members of the Founding era were surely familiar with the Court of Session and Kames's capacious conception of the *nobile officium*.<sup>58</sup> Kames himself viewed Scots and English law as bearing a sufficient "resemblance" to warrant useful comparative study, reckoning that the differences would help to "illustrate each other by their opposition."<sup>59</sup>

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54. See *infra* Part II.B.

55. Indeed, the Process Act of 1789 called for the lower federal courts to apply in suits at common law the procedural rules of the states in which they were established and to apply the rules of "civil law" in suits in admiralty, maritime, and equity jurisdiction. See 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 509–37 (1971) (describing the evolution of the Process Act).

56. See generally Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951) (describing the history of reception statutes). In this respect, reception statutes simply carried forward a practice of reliance on English sources that began during colonial times. See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 767 n.180 (2010).

57. See Pfander & Birk, *Scottish Judiciary*, *supra* note 20, at 1627–31.

58. An originalist-minded colleague has suggested to me that one might treat Scots law as an illustration of what the Constitution's framers would have expected had they been asked to imagine public law litigation of the kind that modern standing law seeks to moderate. Cf. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (expressing doubt that even the most "gifted" of the "begetters" could have foreseen the constitutional developments of the twentieth century).

59. KAMES, *supra* note 25, at xii.

This Article proceeds in three Parts. Part I sketches Scottish standing law in the eighteenth century, from title and interest to sue in private litigation to the Roman-law *actio popularis* that governed public actions. Part II compares Scots standing law with the law that began to take hold in early-twentieth-century America, identifying surprising areas of overlap, affinity, and fruitful comparison. While the Scots were not attempting to solve modern problems, their approach places our own debate over the origins and legitimacy of standing law into a historical context that may facilitate a somewhat more dispassionate analysis. A brief conclusion suggests that we can learn both from what Scots law says about the law of standing and from what the relative invisibility of the Roman *actio popularis* says about the Anglo-centricity of our discussions of Founding-era conceptions of the judicial power.

### I. STANDING IN THE SCOTTISH COURT OF SESSION

As a prelude to an assessment of the standing law of Scotland, this Part begins with a brief overview of Scottish institutions and a description of the structure of the Scottish court system and the Court of Session. In next describing the eighteenth-century Scots law of standing, this Part focuses on the way leading treatises of the period described the requirements of title and interest to sue and the right of individuals to pursue an *actio popularis*. The descriptions come from sources that circulated as the common currency of well-read lawyers of the period, such as Kames's *Historical Law Tracts* and other works of Scotland's leading institutional writers.<sup>60</sup> This Part also canvasses some of the decisional law of the period.

It is worth posing a question at the outset. Scotland was apparently alone among English-speaking countries in imposing an explicit threshold standing requirement in the eighteenth century. In contrast to Scottish experience, the English reportedly had no comparable doctrine. Although he combed through the English reports with some care, Jaffe reported that he “encountered no case before 1807” in which the “standing of the plaintiff is mooted.”<sup>61</sup> Similarly, scholars

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60. For background on Scots law sources and the way Scottish law books and ideas came to influence British North America in the eighteenth century, see Pfander & Birk, *Scottish Judiciary*, *supra* note 20, at 1631–42. In explicating Scots law of the eighteenth century, this Article relies primarily on law books that were available to American lawyers.

61. Jaffe, *Standing to Secure*, *supra* note 9, at 1270. I have found occasional references to title and interest to sue in English and American works on early-nineteenth-century practice in courts

tend to agree that the early American cases fail to articulate a formal body of threshold standing law, although some report evidence of standing-like concerns by the nineteenth century. Indeed, most American scholars trace the rise of standing law to the late nineteenth and early twentieth centuries, just as English decisions began to take standing questions more seriously in the 1890s.<sup>62</sup> What led the Scots to confront and resolve issues of standing several decades before their cousins to the south and west?

*A. Scotland, the Court of Session, and Review of Government Action*

1. *The Practice of the Court of Session.* Building on fifteenth-century precursors,<sup>63</sup> the Scots Parliament created the Court of Session in 1532.<sup>64</sup> Session's jurisdiction extended to a range of original proceedings and included the power to review the decisions of such inferior tribunals as the sheriffs courts, the justices of the peace, and

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of equity. *See, e.g.*, JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL 126 (James Kent ed., New York, McDermit & D.D. Arden, 1816) (treating letters of administration as essential to confer title to sue in the context of estate administration). Closer study may reveal more such references in early equity reports.

62. Jaffe, *Standing to Secure*, *supra* note 9, at 1271–72.

63. The Scottish Parliament created a supreme court in 1426 consisting of a council of the royal Chancellor and nine other persons chosen to “determine complaints and causes.” DAVID M. WALKER, THE SCOTTISH LEGAL SYSTEM: AN INTRODUCTION TO THE STUDY OF SCOTS LAW 133–34 (8th ed. 2001). Over the course of the fifteenth century, the court continued in various forms, attending to both civil and criminal matters and various forms of appeals. *Id.* at 135–36. *See generally* John W. Cairns, *Revisiting the Foundation of the College of Justice*, 52 STAIR SOC'Y 27 (2006) (describing the foundation of the College of Justice in King James's reign).

64. In 1532, Parliament established the College of Justice (also known as the Court of Session) as a permanent body, evenly split between lay lawyers and clerics. MICHAEL C. MESTON, W.D.H. SELLAR & LORD COOPER, THE SCOTTISH LEGAL TRADITION 43–44 (1991). Parliament authorized the Chancellor, if present, to “occupy the presidential chair.” WALKER, *supra* note 63, at 137. The Court of Session “exercised a supervisory jurisdiction over lower courts and . . . jurisdiction in heritage, formerly reserved for feudal courts.” *Id.* at 138. In 1672, Parliament established the High Court of Justiciary as the supreme court for criminal matters. *Id.* at 147. The Scots court system was preserved by the Acts of Union of 1707, which formally united Scotland and England into Great Britain and ended, at least for a time, the Scottish Parliament. *Id.* at 154–55. The Acts of Union afforded British-style constitutional protections to the Court of Session, confirming its supremacy in relation to lower courts in Scotland and clarifying that its decisions were not subject to review by the English courts at Westminster. *Id.* at 155. Following the union, the House of Lords began hearing appeals from the Court of Session. *Id.* at 158. For more on the possible influence of the Court of Session and Acts of Union on the structure of Article III of the Constitution of the United States, see generally Pfander & Birk, *Scottish Judiciary*, *supra* note 20. On the reinstatement of the Scottish Parliament in 1999 in response to pressure for devolution, see generally Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543 (2014).



the ecclesiastical and admiralty courts.<sup>65</sup> Though forms of supervisory review varied, the Court of Session often deployed homegrown remedies such as reduction, advocation, and suspension to maintain uniformity of decision and correct errors in lower courts. As Kames described these modes of review, they operated something like the English prerogative writs.<sup>66</sup> With an advocation, the court removed actions from lower courts for decision by a higher tribunal (often itself) in somewhat the same way that King's Bench in England would remove matters from lower courts through the writ of certiorari.<sup>67</sup> Reduction and suspension resembled the English writ of prohibition; a reduction would set aside the decree of a lower court while a suspension would prevent the execution of a decree during the pendency of review.<sup>68</sup>

Three features of the Court of Session's practice in the eighteenth century deserve special attention. First, the court viewed itself as a court of equity, available to hear claims of injustice in the last resort when other remedies proved inadequate—a power known as *nobile officium*.<sup>69</sup> Second, the court was broadly responsible for public administrative law and was generally available to hear claims against

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65. See Pfander & Birk, *Scottish Judiciary*, *supra* note 20, at 1653–56. The breadth of the Court of Session's jurisdiction created serious docket concerns by the late eighteenth century, compounded by the practice of leaving issues open to seemingly endless motions for reconsideration through reclaiming petitions. See Nicholas Phillipson, *Litigation in the Court of Session in the Later Eighteenth Century*, 37 *STAIR SOC'Y* 42, 46, 60–61 (1990) (noting that the volume of litigation increased “phenomenally” in the eighteenth century and that the court gained a reputation, especially among merchants, for its inability to deliver speedy justice).

66. For more on the life of Kames, his service on the Court of Session, and his contributions to the Scottish enlightenment, see IAN SIMPSON ROSS, *LORD KAMES AND THE SCOTLAND OF HIS DAY* (1972); DAVID M. WALKER, *THE SCOTTISH JURISTS* 220–47 (1985). For more on the English prerogative writs of mandamus, prohibition, certiorari, and quo warranto, see generally James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *HARV. L. REV.* 643 (2009).

67. See Pfander & Birk, *Scottish Judiciary*, *supra* note 20, at 1654.

68. See 2 ROBERT BELL, *A DICTIONARY OF THE LAW OF SCOTLAND* 660 (Edinburgh, J. Anderson 1808) (“The reduction is a rescissory action, by which deeds, services, decrees, or illegal acts by any body corporate may be rendered void.”). The Scots also borrowed some features of the writ system from England, but did not follow them slavishly. See WALKER, *supra* note 63, at 125 (“English forms were, however, often discarded or modified and Scotland had fewer and more adaptable basic writs than the great multiplication of writs in the English register.”).

69. See KAMES, *supra* note 1, at 232 (linking the Court of Session's powers of *nobile officium* to the demise of privy council). For a sharp critique of Kames and his vision of the court as one with broad equitable powers, see GILBERT STUART, *OBSERVATIONS ON PUBLIC LAW AND THE CONSTITUTION OF SCOTLAND* 268–69 (Edinburgh, W. Creech 1779). Gilbert Stuart described the Court of Session and its *nobile officium* not as a “right” but as a “deformity” and decried the court's exercise of equitable discretion as a “usurp[ation]” of the legislative power. *Id.*

both local and national government officials.<sup>70</sup> Third, it developed the power to issue a declarator—what Americans now refer to as a declaratory judgment.<sup>71</sup> The declarator was available in both public and private litigation, but it proved especially useful in connection with actions to contest government authority. In such proceedings, the court would refuse to enjoin or interdict government action but was quite willing to declare the meaning of the applicable law and rely on government officials to carry its decrees into effect.<sup>72</sup>

Although Scots law owed much to civil law precursors, it had evolved as a distinct body of law by the eighteenth century.<sup>73</sup> Young

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70. The Court of Session refused to recognize a doctrine of Crown immunity. *See* 2 LORD BANKTON, *INSTITUTES OF THE LAWS OF SCOTLAND*, bk. IV, at 602 (Edinburgh, R. Fleming 1751) (“All persons, even those in authority, may be pursued with us, without exception of the king, but then the officers of the state are only called, they being bound to answer for his majesty.”); T.B. SMITH, *BRITISH JUSTICE: THE SCOTTISH CONTRIBUTION* 190 (1961) (explaining the absence of Crown immunity and identifying early exemplars of suits against the king’s ministers); *see also* Lord Murray, *Rex Non Potest Peccare*, 55 SCOT. L. REV. 1, 3–6 (1939) (describing the practice of allowing officers of state to sue and be sued for the Crown in matters in which the government was interested, and distinguishing Scots practice from that in England). One commentator reports that, prior to 1707, the English maxim, “the King can do no wrong” had not even appeared in Scots law. Instead, “early Scots’ statements of the right to convene the Crown as defender appear[ed] to set no such limit upon the general competency of [such] actions.” J.R. Philip, *The Crown as Litigant in Scotland*, 40 JURID. REV. 238, 246 (1928). In particular, the Court of Session “did not treat the Crown as immune from actions founded on delict or negligence.” *Id.* at 248. For more on the Court of Session’s role in relation to local government, *see* ROBERT BELL, *TREATISE ON THE ELECTION LAWS AS THEY RELATE TO THE REPRESENTATION OF SCOTLAND IN THE PARLIAMENT OF UNITED KINGDOM OF GREAT BRITAIN AND IRELAND* 475–94 (1812).

71. C.L.G., *Constitutionality of the Declaratory Judgment Act as Affected by the Scope of Judicial Functions*, 11 VA. L. REV. 473, 474 (1925) (underscoring that the “action of declarator had existed [in Scotland] for hundreds of years”); *see also* SCOTTISH LAW COMM’N, MEMORANDUM NO. 14: REMEDIES IN ADMINISTRATIVE LAW § 7.1, <http://www.scotlawcom.gov.uk/files/4113/1357/8645/cm14.pdf> [<https://perma.cc/BV9F-BPA3>] (noting that “the declarator is one of the oldest Scottish remedies [and] is of very broad scope throughout the law”).

72. On the refusal of the Court of Session to direct an interdict (a negative injunction) at the government, *see* Adam Tompkins, *The Crown in Scots Law*, in *PUBLIC LAW IN SCOTLAND* 262, 272–73 (Aileen McHarg & Tom Mullen eds., 2006). *See also* *Magistrates of Rothsay v. Officers of State*, n.45, 22 June 1820, in *DECISIONS OF THE COURT OF SESSION* 155 (J.A. Wilson et al. eds., Edinburgh, Manner & Miller, 1821) (reviewing a suit brought against the “officers of the state” which sought a declaration indicating that a local community retained, under a 1681 law, a maritime jurisdiction otherwise vested in the national admiralty court).

73. *See generally* Borchard, *supra* note 52 (describing the Roman and French civil law origins of the Scottish action of declarator). Scots procedure drew on civil law forms. *See* 5 DAVID M. WALKER, *A LEGAL HISTORY OF SCOTLAND: THE EIGHTEENTH CENTURY* 593–95 (1998) (describing the libel, summons, and litiscontestatio as cornerstones of Scottish civil procedure). But in formulating rules of decision, the Court of Session emphasized the leading treatise and its own past decisions and often downplayed Roman law. *Cf.* WALKER, *supra* note 63, at 337–41 (noting the infrequency of references to Roman law in resolving current disputes). Professor Ewald attributes the influence of the civil law in Scotland to the Scots’ “auld alliance” with France

Scots lawyers were often educated in civil law at continental universities,<sup>74</sup> Scotland's conception of legal authority treated case decisions both as evidence of customary law and as binding authority,<sup>75</sup> treatises followed the institutional tradition of the civil law,<sup>76</sup> and the great institutional writers (Lord Bankton and John Erskine in the eighteenth century) were viewed as authoritative in their statements of the law.<sup>77</sup> As perhaps befits a civil law nation, Scotland did not always attend to the publication of its judicial decisions with quite the same care as England.<sup>78</sup> Often the reports of the decisions of the Court of Session set out the facts and arguments of the parties and paid scant attention to the rationale of the decision.<sup>79</sup> Advocates and judges would reason from first principles, as restated by the institutional writers, and from the precedents set by earlier decisions.<sup>80</sup>

2. *Central Government Oversight and the Declarator.* With some background in place, this section briefly reviews the role of the Court of Session in assessing the legality of central-government action, something that we associate today with administrative law. One can see

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(against England) and their reliance on continental universities to train lawyers in canon law. *See* Ewald, *supra* note 22, at 1073–75 (concluding that Scots' reliance on civil law made Scots law more technically sophisticated than England's). For an account, see generally Phillipson, *supra* note 65.

74. *See* WALKER, *supra* note 73, at 374–75 (describing leading figures of the Scots bar as having studied at Utrecht, Leiden, and Groningen); Ewald, *supra* note 22, at 1098–1100 (emphasizing the prevalence of continental legal education for aspiring Scots lawyers).

75. *See* WALKER, *supra* note 73, at 338 (noting the importance of adherence to prior decisions).

76. On the institutional tradition in Scotland, see Pfander & Birk, *Scottish Judiciary*, *supra* note 20, at 1637–42.

77. *See* WALKER, *supra* note 73, at 351–52 (describing the influence of Bankton and Erskine). *See generally* Kenneth G.C. Reid, *John Erskine and the Institute of the Law of Scotland* (University of Edinburgh Sch. of Law Research Paper Series No. 2015/26, 2015) (describing Erskine's *An Institute of the Law of Scotland* as the “most important work on Scots' law of the eighteenth century”).

78. *See* R.S., *supra* note 25, at 179 (noting the prejudices of Scottish judges against the public reporting of their opinions); *see also* Phillipson, *supra* note 65, at 53 (observing that, because judges were not obliged to explain their votes and there was no means of reporting the opinions of the judges who chose to state them, unsuccessful litigants could be left to wonder why they had lost).

79. Walker credits Dalrymple with publishing the first set of reports that summarize the judges' opinions. *See* WALKER, *supra* note 73, at 391. Earlier reporters frequently made mistakes and failed to publish their volumes on time. *See id.* at 435–38 (describing the travails of reporters and authorized collections of decisions from the period as tardy and defective).

80. *See* Ewald, *supra* note 22, at 1109–13 (describing the influence of Scottish education on the mind of James Wilson).

the court's approach in *Hopeton v. Officers of State*,<sup>81</sup> a 1750 decision that nicely illustrates the Court of Session's use of the declarator action. Private parties brought such actions to clarify their legal rights in relation to the government, unembarrassed by any doctrine of sovereign immunity that would limit the lawsaying power of the court. After sketching *Hopeton*, this section steps back to consider the elements of the *Hopeton* decision and what they tell us about Scots law.

During the economic boom of the eighteenth century, growing demand for coal, lead, and other valuable minerals led Scottish landowners to expand commercial mining operations.<sup>82</sup> But there was a potential problem: at least in theory, the Crown's prerogative extended to the ownership of all such below-ground minerals. To commence mining operations, prudent landowners were obliged to secure a grant that conveyed the Crown's prerogative mining interest to them. Legislation adopted in 1592 authorized the Crown "to make such grants," but one may have wondered about the vitality and self-enforcing quality of such legislation after the passage of nearly two centuries and the union with England.

Apparently concerned with just such uncertainties, the Earl of Hopeton, acting in his personal capacity, sought to establish his right to extract the minerals from his property. He first applied to the treasury department for a grant of mines and minerals within his lands. The commissioners of the treasury, in turn, referred his application to the Barons of the Exchequer, the judges of the court charged with the management of the Crown's proprietary interests and tax revenue. The barons offered little clarity: they simply reported in the words of the 1592 legislation that "it is lawful to his Majesty to make such a grant," suggesting that any rights to the mines and minerals had already been conveyed.<sup>83</sup> The earl was not satisfied; the barons had told him that he owned what he owned but had failed to clarify the extent of his right to extract minerals from his property.

The earl, accordingly, brought an action for a declarator before the Court of Session. He named the "officers of state" as defenders and

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81. *Hopeton v. Officers of State* (1750) ScotCS, in 31 WILLIAM MAXWELL MORISON, THE DECISIONS OF THE COURT SESSION FROM ITS INSTITUTION UNTIL THE SEPARATION OF COURT INTO TWO DIVISIONS IN THE YEAR 1808, DIGESTED PROPER HEADS, IN THE FORM OF A DICTIONARY 13,527 (1811).

82. See WALKER, *supra* note 73, at 63–70 (describing a gradual shift from agriculture to an economy that featured mining and manufacturing).

83. See *Hopeton*, in 31 MORISON, *supra* note 81, at 13,527.

argued, again, that he had a right to the grant.<sup>84</sup> The defenders did not deny the earl's right, but simply argued that it was improper to bring an action. According to the defenders, such actions would lie only if the pursuer's claim of right was denied. Here, the right was admitted, depriving the proceeding of the necessary stuff of litigation. There was, according to the defenders, no "wrong done" or "right withheld" and no justification for the court's intervention.<sup>85</sup>

The Court of Session disagreed with this defense and provided the earl with the declarator he sought.<sup>86</sup> Although the court acknowledged that litigants ordinarily allege a previous invasion of their rights, it explained that such allegations were not essential in declarator proceedings. The court thus "repelled" the objection to the pursuer's declarator and found that he had a "right in terms of the act of 1592."<sup>87</sup> Crucially, the court went on to provide essential clarification of the nature of the right, declaring that it "was not lawful for the Crown to work the said mines, or set them in feu or tack to any other person."<sup>88</sup> The declarator both affirmed the earl's right to mine the land and clarified that the earl's right trumped any claim of the Crown.

The Court of Session's handling of *Hopeton* illustrates three distinctive features of Scots law. For starters, the declarator provided the earl with the certainty he sought, precisely the function of the modern declaratory-judgment proceeding. Scots law was famous for making declaratory-judgment actions available to litigants who were genuinely uncertain as to the nature of their legal rights.<sup>89</sup> What's more, the proceeding nicely illustrates the willingness of the Court of Session to entertain claims against the Crown. Session had long since established that pursuers in litigation with the Crown were to name the officers of state, perhaps the lord advocate or the minister of the Crown office involved in the litigation.<sup>90</sup> No one regarded the interest of the

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84. *Id.*

85. *Id.* at 13,528.

86. *Id.*

87. *Id.*

88. *Id.*

89. The Scots declarator proceeding thus provided the inspiration for English law reforms of the nineteenth century and eventually led to the adoption of declaratory-judgment proceedings in the United States. For more on English reform efforts to persuade Parliament to adapt the Scots declarator proceeding for use in English courts and a history tracing the origins of the Scots declarator to precursors in French law, see R.S., *supra* note 25, at 180. For more on the eventual adoption of reforms in England and the United States, see generally Borchard, *supra* note 52.

90. For a discussion of the origins of the Scots' idea that individuals were free to interplead with the Crown, see SMITH, *supra* note 70, at 198. For an early statement of this principle, see

Crown as a barrier to the declaration of the earl's right to mine his land and no claim of Crown immunity appears to have surfaced in the proceeding. Nor did Scots law require, as was the case in England, that the pursuer first seek leave to bring an action against the Crown.

Finally, the decision highlights the Court of Session's conception of its equitable role as the court of last resort in Scotland. The Court of Exchequer, to which the earl's petition was initially referred, was a relatively new tribunal, at least in Scotland; it was created in 1707 in accordance with provisions of the Acts of Union that were designed to ensure the uniform collection of Crown revenue throughout the United Kingdom.<sup>91</sup> Importantly, the Court of Session did not exercise any direct appellate oversight over the Scottish Court of Exchequer; instead, revenue matters were resolved in accordance with Exchequer tradition.<sup>92</sup> Despite its inability to oversee Exchequer directly, however, the Court of Session was only too ready to provide the earl with the assurance he needed as to his right to conduct mining operations. It does not seem to have occurred to anyone that the court should stay its hand in deference to the Court of Exchequer or to the treasury department.

3. *Local Government Oversight.* Apart from its role in overseeing the legality of central government actions, the Court of Session often heard challenges to the way local governmental bodies managed the affairs of daily life. There was plenty of such work to do. Local government in eighteenth-century Scotland consisted of a patchwork quilt of overlapping entities, each with its own history and function.<sup>93</sup>

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BANKTON, *supra* note 70, at 602 ("All persons, even those in authority, may be pursued with us, without exception of the king; but then the officers of state are only called, they being bound to answer for his majesty."). For more on the influence of English ideas of immunity, see Mitchell, *supra* note 25, at 304 (contending that Scots law later came to recognize Crown immunity likely as a consequence of English influence).

91. See 2 AE. J.G. MACKAY, *THE PRACTICE OF THE COURT OF SESSION* 192–93 (Edinburgh, T. & T. Clark 1879) (describing the Act of Union origins of the Court of Exchequer). The jurisdiction of the Court of Exchequer was transferred to the Court of Session in 1856. *Id.* For background on the Court of Exchequer's introduction into Scotland as part of the Acts of Union and its role in collecting taxes, see WALKER, *supra* note 73, at 178–82.

92. Appeals from the Court of Exchequer were routed to the House of Lords. See A.J. MacLean, *The 1707 Union: Scots Law and the House of Lords*, 4 J. LEGAL HIST. 50 (1983). Although the Court of Exchequer was a new creation in Scotland and was to be conformable to the Court of Exchequer in England, the Acts of Union required that the existing law, private rights, and practice pursued in Scotland "be preserved." *Id.* at 56. The Court of Session's willingness to interpose by declarator may reflect a judgment that the Court of Exchequer had failed to protect the earl's private rights.

93. WALKER, *supra* note 63, at 159.

By the eighteenth century, feudal baronies and regalities had lost much of their judicial function but maintained some administrative functions involving pasturage and infrastructure.<sup>94</sup> Much local government was in the hands of local sheriffs, justices of the peace, and officers of the burghs. Royal burghs, originally market-centers with royally granted commercial monopolies,<sup>95</sup> were “self-contained agencies of local government,” consisting of a local “constitution” or “sett” and governed by the burgh’s “provost[s], bailies and self-elective town councils.”<sup>96</sup> Burghs of barony and other feudal offices also existed, although their government varied depending on the agreement with the feudal superior.<sup>97</sup> The bailies of a burgh formed a burgh court with jurisdiction over both criminal and civil suits within the burgh, although more serious cases were eventually taken over by the justices of the peace and the Court of Session.<sup>98</sup> In addition to its spiritual duties, the established church (kirk) managed public education and provided public support for the poor of the parish. Scottish ecclesiastical courts, like other inferior courts, were subject to the oversight of the Court of Session.<sup>99</sup>

Often the boundary between what we would consider to be administrative and judicial functions was blurred. For example, justices of the peace had such disparate responsibilities as settling commercial disputes and small debt cases, maintaining roads and bridges, suppressing riots, and administering liquor licenses.<sup>100</sup> Sheriffs, who served as representatives of the king (or the king’s vassals) in charge of “maintain[ing] order and the collection of revenue in the king’s name,”<sup>101</sup> also had both judicial powers over civil and criminal suits and administrative functions.<sup>102</sup> As one important forum for the oversight of these manifold functions (along with the Court of Exchequer), the

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94. *Id.* Originally, feudal lords had both civil and criminal jurisdiction over the inhabitants of their lands. *Id.* at 115.

95. *Id.* at 119.

96. *Id.* at 159.

97. *Id.*

98. *Id.* at 120.

99. Kames explains that the Court of Session would not necessarily deprive a wrongly seated minister of his office but could review the decision to seat him and deprive him of his salary if the ecclesiastical court had proceeded wrongfully. *See KAMES, supra* note 25, at 240–41.

100. WALKER, *supra* note 63, at 159–60.

101. *Id.* at 117, 122.

102. *Id.* at 159.

Court of Session often found itself drawn into administrative matters, such as disputes over the accuracy of weights and measures.<sup>103</sup>

### B. *Standing Law in Scotland*

1. *Title and Interest To Sue.* In mounting a challenge to government (or private) activity, pursuers in the Court of Session were obliged to show that they had “title” and “interest” to sue, a feature of Scots law that was already well established by the eighteenth century. The Scottish constructs of title and interest to sue were in essence a standing requirement, a requirement that pursuers demonstrate a proper stake in the matter before the Court of Session would reach the merits of their claims. Indeed, Scots authorities linked the construct of title and interest to the Roman-law notion that litigants were required to show *persona standi in judicio*.<sup>104</sup> Thus, in the eighteenth century, the institutionalist George Mackenzie described title and interest to sue as a requirement that the pursuer have the “the Right standing in his Person” to bring the action, an echo of the Roman formulation.<sup>105</sup>

As for the meaning of title and interest to sue, consider the characteristically pithy account in Kames’s *Elucidations*. Interest was relatively simple; it required that the actor—either plaintiff or defendant—receive some benefit from the action.<sup>106</sup> In considering the

103. See *Paterson v. Magistrates of Stirling* (1783) ScotCS, in 5 MORISON, *supra* note 81, at 1997, 1999 (agreeing to resolve a dispute over the times at which a town market would commence the sale of yarn and further prohibiting its sale outside of the times fixed in the decree); *Finlay v. Magistrates of Linlithgow* (1782) ScotCS, in 17 MORISON, *supra* note 81, at 7390–92 (appointing experts to devise a uniform measuring device and decreeing that the town was prohibited from authorizing any measure that did not meet the new standard). See generally JOHN ERSKINE, AN INSTITUTE OF THE LAWS OF SCOTLAND bk. I, tit. 22, at 406 (Edinburgh, R. Fleming 1773) (describing the “ministerial” powers of the Court of Session as extending to the setting of prices in Edinburgh and the appointment of magistrates and other inferior officers, and ascribing these powers to the Court of Session’s status as successor to the Privy Council).

104. See 2 JOHN SHANK MORE, LECTURES ON THE LAW OF SCOTLAND 260–62 (John McLaren ed., Edinburgh, Bell & Bradfute 1864) (treating the pursuer’s “proper title to sue” as the “first point to consider,” and observing that an “outlaw, having no *persona standi in judicio*, can neither sue nor defend”). See generally DEANS, *supra* note 26, at 170–73.

105. MACKENZIE, 1706, *supra* note 31, at 274 (emphasis omitted). By the nineteenth century, treatise writers were distinguishing the two constructs. See 1 CHARLES FARQUHAR SHAND, THE PRACTICE OF THE COURT OF SESSION 169 n.1 (Edinburgh, T. & T. Clark 1848) (“A title to pursue applies to particular actions, and requires, besides the general qualification of having a *persona standi*, that the party have both a title and an interest to urge the particular suit.”). *Persona standi* refers to the general capacity to sue; thus, infants and alien enemies were denied this capacity.

106. KAMES, *supra* note 1, at 213.



question of what sort of interest suffices to permit one to pursue or defend, Kames said the following:

[I]n a court of justice, however well founded an action or a defence may be in itself, it will be rejected as idle and foolish, if the person who acts can draw no benefit from it, or have no interest in it, as expressed in law-terms. Hence a rule, That *right* without *interest* will not be sufficient in a process, either by way of action or objection: and as little will *interest* without *right*.<sup>107</sup>

Both parties, according to Kames, had to show both title and interest in order to invoke the authority of a court of justice. The requisite interest was essentially financial<sup>108</sup>: as Kames explained, “no interest is regarded in a process but what is pecuniary,” and “[t]he interest of ambition, of revenge, or of any other passion that is not lucrative, is totally disregarded.”<sup>109</sup> Here we perhaps find in Kames an early version of Justice Scalia’s suggested distinction between “Wallet Injury” and “Psychic Injury.”<sup>110</sup>

Title was a more complicated, or at least more variegated, concept. As the term suggests, title was frequently used to describe a formal claim to legal ownership of the right in question (sometimes including the right to sue to vindicate the right). Kames defined title in this formal sense as “the evidence of a right,”<sup>111</sup> a definition that calls to mind documentary evidence of title such as a deed to land or letters

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107. *Id.*

108. Kames explained that the requirement of title and interest was not limited to plaintiffs. Defendants too had to have title and interest, although “as every defendant finds in his account in an absolver, it is obviously his interest to defend himself against a claim that is not founded on law.” *Id.* at 217. The 1926 *Encyclopaedia of the Laws of Scotland* states that a person called to defend had title because “the pursuer, by calling him as a defender, in effect concedes his title to defend, otherwise the pursuer’s own title would fail from want of interest.” 1 *ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND*, *supra* note 30, at 93. But in some cases, defendants did not have title. For example, a tenant on land conveyed as collateral for debt did not have title to challenge his eviction by the creditor through a challenge to the creditor’s right to the land, because the debtor rather than the tenant would have title to challenge the creditor’s right to the land. KAMES, *supra* note 1, at 220.

109. KAMES, *supra* note 1, at 214.

110. See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619 (2007) (Scalia, J., concurring) (distinguishing “Wallet Injury” from “Psychic Injury” and concluding that the latter does not suffice to confer standing).

111. KAMES, *supra* note 1, at 127. Modern sources largely echo Kames. One modern source defines title as being “a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies.” DEANS, *supra* note 26, at 171 (quoting Lord Dunedin in *Nicol v. Dundee Harbour Trs.*, (1915) SC (HL) 7).

patent conferring title to an office. But the Court of Session did not insist that pursuers present documentary evidence of their rights or titles; implication would suffice. Thus, Scots law recognized that one person's duty or obligation implied another person's right, conferring title to enforce the obligation.<sup>112</sup> Still, only the owner of a right had title to sue regarding that right; other potentially interested parties were foreclosed from doing so.<sup>113</sup>

To see how title and interest might perform slightly different functions as a test of a party's ability to sue, consider an example from a Scots treatise. After discussing title and interest as a legal construct, one writer highlighted the importance of title by noting that, although a widow had an interest in her husband's estate, title to pursue claims on behalf of the estate vested in the executor.<sup>114</sup> Similarly, in contract actions, the seller had title to bring suit to recover the sales price from the buyer,<sup>115</sup> but interested third parties to the legal relationship did not hold title to the right at issue. As the Scots explained matters, "a person has no title to sue in respect of a wrong done to another."<sup>116</sup> But, consistent with equitable notions, title was not inflexible. For example, if one were to make a contract to benefit a third party and then became unable to enforce that contract, the third party would be allowed to litigate the matter.<sup>117</sup>

Practice in connection with title and interest bore some similarities to modern standing law in the United States in that it was regarded as a threshold requirement separate from the merits. To facilitate the court's evaluation of the issue at the outset, practice required the initial statement of the case to include a description of the pursuer's title and interest.<sup>118</sup> Defenders were permitted to argue that the court should not reach the merits because the pursuer lacked title and interest to sue.

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112. HENRY HOME, LORD KAMES, *PRINCIPLES OF EQUITY* 6 (Edinburgh, Kincaid & Bell, 2d ed. 1767).

113. The Scots used the familiar term *jus tertii* to refer to the objection that an action was brought without the plaintiff having an interest. KAMES, *supra* note 1, at 214.

114. See 2 MORE, *supra* note 104, at 260–62.

115. KAMES, *supra* note 1, at 128.

116. 1 *ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND*, *supra* note 30, at 69.

117. KAMES, *supra* note 112, at 242. Landlord–tenant relations could complicate issues of title. Only the tenant had title to sue for “transitory” injuries to the property, such as trespass with no intent to create a permanent right. 7 GREEN’S *ENCYCLOPAEDIA OF THE LAW OF SCOTLAND* 4–5 (John Chrisholm ed., 2d ed. 1912). The landlord had no title to sue regarding injuries “merely to the possession (as, e.g., by noise, smoke, or vibration).” *Id.* But where the landlord’s rights or reversion were injured, the landlord had title to sue. *Id.*

118. ERSKINE, *supra* note 103, at 662.

Thus, in *Anderson v. Magistrates of Renfrew*,<sup>119</sup> the defenders objected to the title of the pursuers, arguing that “private burgesses cannot compel their Magistrates to render account of their administration.”<sup>120</sup> Some leading eighteenth-century Scottish jurists described standing as a defense that had to be made before engaging on the merits of the action, or else it was waived.<sup>121</sup> But on occasion, the court would reach the issue of title and interest to sue on its own motion.<sup>122</sup>

Although other reasons may have contributed, the Court of Session chose to conduct a preliminary inquiry into standing in part to ensure the proper operation of preclusion, or *res judicata*. One treatise from the nineteenth century put it this way: “The interest of the defender to see that the pursuer has a proper title is obvious; for, otherwise, the discharge granted on payment of the claim may be insufficient, and a decree of absolvitor will not afford a plea of *res judicata*.”<sup>123</sup> Kames explained that title and interest were required because a “decree is effectual between the litigants only; and a court will give no countenance to an action or to a defence that cannot be effectual.”<sup>124</sup> Both writers were saying essentially the same thing. A decree will enjoy preclusive effect only if brought and defended by parties with title and interest to sue and defend. Therefore, the parties and the court must inquire into title and interest as a matter separate

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119. *Anderson v. Magistrates of Renfrew* (1752) ScotCS, in 5 MORISON, *supra* note 81, at 2539; *see also* *Guild v. Scott* (1809) ScotCS, in DECISIONS OF THE COURT OF SESSION 469, 470 (J.H. Mackenzie et al. eds., Edinburgh, Smellie 1811) (noting that the defendants “pleaded the preliminary objection, that the pursuers had no title to appear in the present action,” and arguing that the recognition of their title would be tantamount to the approval of a “popular action”).

120. *Anderson*, in 5 MORISON, *supra* note 81, at 2539.

121. 2 ERSKINE, *supra* note 103, at 662. According to Erskine, a lack of *persona standi in judicio* was a “dilatory” defense relating to “preliminaries of a cause.” *Id.* As such, it was deemed waived if not pleaded before any “peremptory” defenses, “which enter into the merits of the cause itself.” *Id.* The 1926 edition of the *Encyclopaedia of the Laws of Scotland* agrees with Erskine. It refers to a plaintiff having to justify title and interest “if called upon by the defenders.” 1 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND, *supra* note 30, at 66–67. Moreover, it agrees that, “[w]here a record was made up without any preliminary plea of no title, and a proof was allowed of consent to each party, . . . the defenders . . . waived the objection.” *Id.* at 68. But a defender could reserve the plea of no title. *Id.*

122. *See* *Hamilton v. Minister of Cambuslang* (1752) ScotCS, in 25 MORISON, *supra* note 81, at 10,570–71 (noting that, even though some of the judges of the Court of Session expressed doubt as to the title and interest of the pursuers, the court ultimately upheld the competence of the proceeding). On occasion, inquiries into title blended with the merits. *See, e.g.*, *Procurator-Fiscal of Haddington v. Forrest* (1741) ScotCS, in 9 MORISON, *supra* note 81, at 7600–01 (concluding that the Justices of the Peace had no title to sue to block the building of pigeon houses, after finding that the proprietors had possessed the right to build for many years).

123. 1 SHAND, *supra* note 105, at 140.

124. KAMES, *supra* note 1, at 213.

from the merits of the claim and must refrain from adjudicating claims when preclusive effect will not apply and the court's disposition will not be "effectual."

2. *The Actio Popularis*. Despite its usual insistence on title and interest in private litigation, the Court of Session administered a well-recognized exception for popular actions, thereby enabling suits to proceed on behalf of the public. Lord Bankton, author of a well-regarded eighteenth-century treatise, put the matter this way:

A division of actions, not to be omitted, is into those, whereby the party interested only can sue; and those in which any person whatever, capable of suing, may prosecute the party, which last are called Popular Actions. Divers of these popular actions took place with the Romans; and some likewise obtain with us, as the prosecution of Invaders of ministers, and that against Usurers, where the parties interested do not sue, and that against Destroyers of the game, etc.<sup>125</sup>

Erskine said much the same thing, tracing the popular action in Scotland to its roots in Roman law:

The Romans also divided actions into private and popular. Private actions could not be insisted in by such as had themselves no interest in the issue of the cause; but an *actio popularis* might have been carried on by any person. Certain actions *ex delicto*, which are authorised by our law, though they cannot be prosecuted by every one, yet carry a reward to the discoverer of the offence or crime, of a determinate portion of the penalty; as in usury, in offences against the game, and in those against statute.<sup>126</sup>

Here then we find two of the eighteenth century's best-known exponents of Scots law in agreement as to the Roman-law origins and viability of the popular action.<sup>127</sup>

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125. BANKTON, *supra* note 70, at 610.

126. 2 ERSKINE, *supra* note 103, bk. IV, tit. I, at 933 (citations omitted).

127. See also PETER HALKERSTON, A TRANSLATION AND EXPLANATION OF THE PRINCIPAL TECHNICAL TERMS AND PHRASES USED IN MR. ERSKINE'S INSTITUTE OF THE LAW OF SCOTLAND 202 (2d ed. 1829) (describing the *actio popularis* as an import from Roman law). The Scots encountered Roman influences through canon law and Roman law taught in universities. Scottish legal writers often considered Roman law to be "a guide and an inspiration but . . . not necessarily [something] to be followed at all or in detail." William Gordon, *Roman Law in Scotland*, in 2 THE CIVIL LAW TRADITION IN SCOTLAND 27 (Robin Evans-Jones ed., 1995). "Although Roman law was still not regarded as having binding authority [in the Court of Session,] there are cases in which it appears in fact to have settled an issue." *Id.* at 30.

Eighteenth-century practice in the Court of Session confirmed the validity of popular actions to remedy grievances that moderns might characterize as generalized grievances. Consider *Magistrates of Renfrew*, an action brought by citizens (or burgesses) of the town of Renfrew to challenge the decision of the magistrates to lease public land.<sup>128</sup> The magistrates argued that the pursuers lacked title to sue by “popular action,” both because the power to lease such lands was formally vested in them and because oversight of their management of the town’s affairs was vested in the Court of Exchequer. Citing an earlier case, *Johnson v. Magistrates of Edinburgh*,<sup>129</sup> the pursuers replied that they sought to enforce a “public law” to vindicate a “right of pasturage” in the lands that was acquired by “immemorial possession.” The Court of Session upheld the burgesses’ title to pursue the action.<sup>130</sup>

Much the same result obtained in *The Merchant Co. v. Magistrates of Herriot’s Hospital*.<sup>131</sup> There, the merchants of Edinburgh were held to have proper title to sue to challenge the decision of the hospital’s board of governors to rent out hospital lands on unfavorable terms.<sup>132</sup> The hospital’s board of governors and the town magistracy were the obvious proprietors of the hospital’s rights and would normally enjoy title to sue. Indeed, in discussing the title of the citizens and trade companies in Edinburgh to bring an action for the sake of the hospital as third parties, the court acknowledged that the current governors of the hospital would be entitled to sue regarding actions of the previous governors. But the court recognized that the current governors were most unlikely to police themselves through a challenge to the lease.<sup>133</sup>

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128. *Anderson v. Magistrates of Renfrew* (1752) ScotCS, in 5 MORISON, *supra* note 81, at 2539.

129. *Johnson v. Magistrates of Edinburgh* (1735) ScotCS, in 2 MORISON, *supra* note 81, at 96.

130. *Anderson*, in 5 MORISON, *supra* note 81, at 2539 (citing *Johnson*, in 2 MORISON, *supra* note 81). The decision in *Gilchrist v. Provost of Kinghorn* appears to be broadly consistent with earlier decisions. *Gilchrist v. Provost of Kinghorn* (1771) ScotCS, in 17 MORISON, *supra* note 81, at 7366. There, the Court of Session found that a public action was not competent where burgesses sued for a *general* accounting of town finances; as the court explained, the task of performing a general accounting had been assigned to the Court of Exchequer. *Id.* at 7374. But “where individuals complained of a particular wrong, the action would be sustained, and redress given in [the Court of Session].” *Id.* at 7373.

131. *The Merchant Co. v. Magistrates of Herriot’s Hospital* (1765) ScotCS, in 8 MORISON, *supra* note 81, at 5752.

132. *Id.*

133. *Id.* (“To say, that the present administrators have the sole right to call themselves to account, or declare their own powers, is absurd.”). The inhabitants of the hospital were all minors and could not sue on their own accord. *Id.*

The court therefore allowed the citizens (or burgesses) and merchants to bring a popular action because they were the “only persons who [could] insist in this action.”<sup>134</sup> Essentially, then, the court recognized a popular action to facilitate a test of legality and to prevent a failure of justice.

Something quite similar to a modern taxpayer action was allowed to proceed as a mechanism to contest the legality of new taxes and the management of public funds. Thus, in *Tod v. Magistrates of St. Andrews*,<sup>135</sup> the Court of Session upheld an individual’s title to challenge a new tax on the transportation of city dung to farmers in the surrounding community.<sup>136</sup> The court went a step further in *Hamilton v. Minister of Cambuslang*.<sup>137</sup> The litigation arose after the parish ministry or kirk of Cambuslang conducted tent meetings and billed the expenses to the parish poor fund. Heritors (citizens) of the parish, obliged by law to support the poor, objected to the extravagant cost of the affair and questioned its propriety as a charge against the poor fund. The kirk session defended by invoking its discretion as to the disposal of charitable money.<sup>138</sup> In the midst of the litigation, some

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134. *Id.*

135. *Tod v. Magistrates of St. Andrews* (1781) ScotCS, in 5 MORISON, *supra* note 81, at 1997.

136. *Id.* (upholding the declarator and finding that the city lacked the power to impose a tax on the sale of dung). Review of the records of this case in the Scottish National Archives reveals that, in addition to David Tod, some nineteen tenant farmers joined in a letter complaining of the new dung tax. See Letter from David Tod to Thomas Ballray, *Tod v. The Magistrates of the Town of St. Andrews*, June 2, 1780, in NAT’L RECORDS OF SCOT., PAPERS OF THE SCOTTISH COURT OF SESSION, record no. CS235/T/4/3, Bldg. WRH, Floor 2, Room D, Bay 123 (visited Sept. 30, 2016) [hereinafter NAT’L RECORDS]. The records do not reveal the extent of any agreement to share the costs of litigation, but one can, without too much extrapolation, regard the proceeding as a form of class litigation in which Tod served as the representative for a sector of the neighboring agricultural community that was bearing the burden of a new tax imposed by St. Andrews.

The foundation for the farmers’ critique of the tax, as elaborated in the papers of their counsel, Henry Erskine, was twofold: dung had been untaxed since time immemorial and the imposition of new taxes required a legislative act. See *Information of Pursuer*, June 1781, in NAT’L RECORDS, *supra*. The farmers did not, apparently, pay the tax themselves, but bore the incidence of the tax when they purchased dung from city-based purveyors. That explains the city’s contention, as recorded in the minutes, that the “action was incompetent, being brought at the instance of a single farmer in the neighborhood . . . who it is apprehended has no title whatever to insist therein.” *Minutes in the Declarator*, in NAT’L RECORDS, *supra* (recounting the argument of attorney Ferguson for the defenders).

137. *Hamilton v. Minister of Cambuslang*, (1752) ScotCS, in 25 MORISON, *supra* note 81, at 10,570.

138. *Id.* at 10,571 (“All the articles [on the list of expenditures except one] were occasioned by the extraordinary confluence of people of this parish to attend divine ordinances; and as the benefit which arose from thence to the poor of the parish has been very great, it is highly reasonable that the expense [of public services] should burden those who had the only pecuniary benefit from them.”).

judges of the Court of Session expressed doubt that such a popular action was permissible.<sup>139</sup> But the court upheld the right of a single heritor to sue the kirk session to obtain an “accounting for their management of the poor’s money.”<sup>140</sup> On the merits, the court disallowed several items of expenditure, thereby compelling the kirk and its officers to restore the amounts to the poor fund.<sup>141</sup>

Despite the court’s embrace of popular actions in some contexts, Scottish legal thinkers in the eighteenth century were not of one mind as to their wisdom and utility. Kames, in particular, had his doubts. In his report of *Lang v. Magistrates of Selkirk*,<sup>142</sup> a case in which he appeared as counsel to the defenders, Kames recounts his argument that citizens lacked title and interest to pursue a claim to recover for the benefit of the town certain moneys that the town’s magistrates had allegedly embezzled or misspent.<sup>143</sup> Kames first established that the “common-good of the burgh” is the property of the community, not of the individual citizens.<sup>144</sup> The complaint (or libel) sought the return of money to the town’s coffers; it did not pursue a claim “for the benefit of the pursuers themselves.”<sup>145</sup> It followed, according to Kames, that the pursuers had no title and no interest to pursue the matter.<sup>146</sup> Title was in the burgh and, because the citizens were “destitute of a pecuniary interest” in the matter, they could not pursue it.<sup>147</sup>

Having shown the absence of title and interest, it followed that the action could be sustained only “as a popular action, competent to every

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139. *Id.* (“It occurred as a doubt to some of the Lords, whether this action was competent to one single heritor of the parish.”).

140. *Id.*

141. *Id.*; see also *Tod v. Magistrates of St. Andrews* (1781) ScotCS, in 5 MORISON, *supra* note 81, at 1997 (granting a declarator to the effect that the magistrates had no power to impose burdens or taxes on the inhabitants of the city, except as “particularly specified in their rights and charters”).

142. *Lang v. Magistrates of Selkirk* (1748) ScotCS, in HENRY HOME OF KAMES, REMARKABLE DECISIONS FROM 1730 TO 1752, at 181 (Edinburgh, Bell & Bradfute, 2d ed. 1799).

143. *Id.* at 184. The case was also reported in Morison’s dictionary, although perhaps inaccurately. See 5 MORISON, *supra* note 81, at 2518. For more on Morison’s occasional lapses, see WALKER, *supra* note 73, at 14 (describing the work as plagued by “many defects” and as neither complete nor accurate). For an account different from that of Kames, see *Lang v. Magistrates of Selkirk*, in 4 M.P. BROWN, GENERAL SYNOPSIS OF THE DECISIONS OF THE COURT OF SESSION 2560 (Edinburgh, W. Tait 1829) (reporting that the court in *Selkirk* “pronounced opposite judgments; but before a final decision, the suit was compromised”).

144. *Lang*, in Kames, *supra* note 142, at 185.

145. *Id.* at 183.

146. *Id.*

147. *Id.* For more on the origins and current nature of common-good property in Scots law, see generally ANDREW C. FERGUSON, COMMON GOOD LAW (2006).

one of the lieges.”<sup>148</sup> Kames sounded themes familiar to modern jurists by arguing against generalized rights to sue. If the popular action were to be accepted, he argued, then “any one person in *Scotland*, who please[d] to give himself the trouble, [would be] entitled to bring an action against the magistrates of any town for mal-administration.”<sup>149</sup> Although he acknowledged Roman practice in permitting some such actions, Kames explained that “experience [had] discovered” that “such processes were oftener directed by private resentment than by zeal for the public.”<sup>150</sup> Accordingly, all of Europe was said to have “laid aside” the practice in civil and criminal cases, with the exception of “special cases . . . directed by particular statutes.”<sup>151</sup> In effect, then, Kames argued that the Court of Session should refrain from recognizing popular actions except as approved by Parliament.

Apart from this argument for deference to Parliament, Kames suggested that all popular actions would have to satisfy two “essential

148. *Lang*, in KAMES, *supra* note 142, at 184.

149. *Id.*

150. *Id.*; *see id.* (describing the pursuers as having abandoned the cause after recognizing the futility of their claim). As counsel to the defenders, Kames argued the following to the Court of Session:

[N]o popular action whatever is admitted in our practice, unless it arise from express statute. In Roman law, more latitude was given. Private parties were allowed to bring actions for the benefit of the public, both civil and criminal. But as it has been found by experience that such process will oftener be [animated] by private resentment than by public good, they are laid aside through all Europe both in civil and criminal cases, special cases excepted, directed by particular statutes. No man is now indulged to bring a criminal accusation where his own interest is not concerned, except the King's advocate who for that reason is styled the Calumniator Publicus. . . . Further, it must be observed upon this head that there is no instance ancient or modern of giving a popular action, unless where the interest of the public is concerned and where no single person has a private interest to form an action at his instance. It would be iniquitous and unnecessary to give an action in such a case for plainly the popular action cannot destroy the private action; and it would be hard beyond measure to oblige every person to [defend] a popular action where he is liable to be called to accompt a second time at the instance of the private party. [If such were permitted, the absolutor in the popular action] will not operate [for the defender as] an exceptio rei judicate.

Answer of Defenders, *Lang v. The Magistrates of the Town of Selkirk*, Nov. 1747, in NAT'L RECORDS, *supra* note 136. Here, Kames emphasizes that the legislature should take the lead in authorizing public actions, that public actions pose a problem for the defense of res judicata, and that private citizens generally cannot enforce the criminal law in the absence of a special interest. *Id.* On the latter point, rejecting private enforcement of criminal law, see *Jardine v. De la Motte* (1895) ScotCS, in 37 MORISON, *supra* note 81, at 16,138 (rejecting the right of a private citizen to institute a suit for perjury); *Syme v. Steele* (1765) ScotCS, in 37 MORISON, *supra* note 81, at 16,124 (rejecting a private action to impose penal sanctions on a bankrupt individual without the approval of the King's advocate).

151. *Lang*, in KAMES, *supra* note 142, at 184.



requisites.”<sup>152</sup> First, the matter at hand must “concern the public.”<sup>153</sup> Second, the matter must be such “that no particular person ha[d] either an interest or title to pursue.”<sup>154</sup> As to the first, Kames argued that the revenues of a burgh were not a public concern any “more than the administration of the revenues of a[] hospital or of a college.”<sup>155</sup> As to the second, Kames explained that towns could always pursue magistrates after they left office, for any delicts committed during their terms as the officials in charge of the management of town revenues.<sup>156</sup> Kames also raised the specter of duplication and conflict, noting that the Court of Exchequer had the power to review town revenues and expenditures. If both a popular action and an Exchequer proceeding were pursued, the two tribunals could reach different decisions, leading to an inextricable “contrariety of judgment.”<sup>157</sup>

Although powerful in the retelling, Kames’s argument did not immediately become the law of Scotland. To begin with, it does not appear that the Court of Session ruled against the pursuers in *Selkirk*.<sup>158</sup> Furthermore, in the *Herriot’s Hospital* case described above, a case that came down after *Selkirk*, the court rejected important elements of Kames’s argument in the *Selkirk* case. In *Herriot’s Hospital*, the pursuers were to gain no concrete pecuniary benefit for themselves; instead, the preservation of the land for the benefit of the hospital would redound to what Kames referred to as the common good.<sup>159</sup> Yet the court nonetheless allowed the action against the hospital’s governors to proceed.<sup>160</sup> By doing so, the court implicitly rejected both the argument that future magistrates might call the current magistrates to account and the claim that the recognition of a public action might interfere with Exchequer oversight.<sup>161</sup>

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 187–88.

158. Although Morison’s report of the case treats Kames’s argument as the rationale of the court in rejecting the pursuers’ claim, Kames’s own report simply suggests that the pursuers declined to press for a judgment because they “despair[ed] of success.” KAMES, *supra* note 142, at 188. Others report an inconclusive result and compromise. *See supra* note 143.

159. The Merchant Co. v. Magistrates of Herriot’s Hospital (1765), in 8 MORISON, *supra* note 81, at 5752.

160. *Id.*

161. *See* Gilchrist v. Provost of Kinghorn (1771) ScotCS, in 17 MORISON, *supra* note 81, at 7373 (concluding that the Court of Exchequer’s authority to conduct a general accounting did not

If ineffective in the near term, the doubts expressed by Kames and others found their way into restatements of Scottish law in the nineteenth century.<sup>162</sup> How then can we square the willingness of the Court of Session to hear public actions in the eighteenth century with the qualified denial of their viability in later years? One authority, James Maclaren, offered the following, suggested harmonization of Scottish authorities:

Although it was stated in [early authorities that Scotland does not recognize the *actio popularis*,] this is hardly correct, as an *actio popularis* is now quite familiar where it partakes of the nature of a declarator or defence of a public right, and whether the encroachment is on the part of those entrusted with the duty of safe-guarding the interests of the public, or on the part of third parties. Accordingly, any member of the community has a title to sue a *popularis actio* to declare a public right-of-way; a right of market; a declarator that the navigation of a public navigable river should not be obstructed; a declarator of common use and enjoyment by the public of a piece of land; for the removal of a public danger or nuisance; and the like.<sup>163</sup>

On this account, Scottish law settled on a practice that encouraged popular actions primarily in the nature of declaratory-judgment proceedings that would clarify contested public rights.

Maclaren's synthesis of Scots law suggests that the qualified nineteenth-century denials of the *actio popularis* were meant to

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displace the Court of Session's role in reviewing specific claims of malfeasance brought by citizens against the town's magistrates). It may not be amiss to note that Kames's successors often treated his assertions about the content of the law with a grain of salt; Kames's impressions of what the law ought to be were said to be "so lively on some occasions as to influence his judgment of what was truly done or meant on the Bench." 1 BARON HUME, LECTURES: 1786-1822, at 15 (1939).

162. John Schank More reported in 1864 that Scotland had "departed from the rule of the Roman law" and held that "no popular action is with us competent to any informer in relation to crimes." 2 MORE, *supra* note 104, at 431. Aeneas James George Mackay explained in 1893 that the "law of Scotland does not, as a general rule, recognise the *popularis actio* of the civil law by any one without a special title for the public interest." AE. J. G. MACKAY, MANUAL OF PRACTICE IN THE COURT OF SESSION 138 (Edinburgh, William Green & Sons 1893). Writing in 1808, Robert Bell denied the existence of the action altogether, at least in civil matters. 2 BELL, *supra* note 68, at 608 ("In the Roman law there were certain actions which might have been carried on by any person, and this was termed an *actio popularis*; but with us there is no civil action of this description . . .").

163. JAMES ANDERSON MACLAREN, COURT OF SESSION PRACTICE 225-26 (1916); cf. *Guild v. Scott* (1809) ScotCS, in DECISIONS OF THE COURT OF SESSION *supra* note 119, at 469 (upholding the public's right to challenge the legality of the management of a toll road, despite the defender's "preliminary objection" as trustee of the road that the pursuers had "no title to appear in the present action" and had "no more interest in the road than any other person who travelled it").

capture the idea that Scotland had turned against one form of the proceeding. Erskine's account of the *actio popularis* reveals that at least some proceedings featured a "reward" for the "discoverer" of the offense or crime.<sup>164</sup> Such an account depicts a proceeding that closely resembles the informer action in England.<sup>165</sup> Kames described such bounty-driven proceedings as problematic, motivated more by private resentment than by zeal for the public.<sup>166</sup> Similar criticisms were leveled against bounty-driven informer actions in England.<sup>167</sup> Scottish authorities agree that private enforcement of criminal law had largely ended by the nineteenth century, having been turned over to the King's advocate.<sup>168</sup> But the *actio popularis* proceedings Maclaren describes did not seek to recover a penal sum or award that would attract bounty-hunting informer-litigants; as explained earlier, the relief took the form of a declaratory judgment and often involved a public body as a defender. The proceedings, moreover, arose from what we today describe as a problem of the "commons," a situation in which rights are held in common by many individuals, no one of whom would suffer a distinctive or concrete injury. Rights to common pasturage, to common navigation, to public markets, and of course to dung<sup>169</sup>: these were the stuff of *actio popularis* litigation,<sup>170</sup> and they bear some resemblance to the citizen suits of today.<sup>171</sup>

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164. See *supra* note 126 and accompanying text.

165. See *supra* note 126 and accompanying text.

166. See KAMES, *supra* note 142, at 184.

167. See Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 89–91 (describing the abuses of the *qui tam* form of litigation and parliamentary efforts to address such concerns as collusive suits and technical complaints); Beck, *supra* note 41, at 573–85 (describing a series of problems with bounty-driven *qui tam* litigation and the various reforms adopted in England to address those problems).

168. See *supra* note 150.

169. For an explanation that the Scots' *actio popularis* proceeding gave every member of the community title to sue for a public right, such as a right to common use and enjoyment of a piece of land, unobstructed navigation of a public river, and a right of market, see *supra* note 163 and accompanying text. For a discussion of the invalidation of a dung tax, see *supra* notes 135–36.

170. See, e.g., *Guild v. Scott* (1809) ScotCS, in DECISIONS OF THE COURT OF SESSION, *supra* note 119, at 469 (common right to travel a well-maintained toll road); *Gilchrist v. Provost of Kinghorn* (1771) ScotCS, in 17 MORISON, *supra* note 81, at 7366, 7371 (allowing a popular action to contest specific town expenditures of public money); *Anderson v. Magistrates of Renfrew* (1752) ScotCS, in 5 MORISON, *supra* note 81, at 2539 (common rights of pasturage); *Hamilton v. Minister of Cambuslang* (1752) ScotCS, in 25 MORISON, *supra* note 81, at 10,570 (heritors' right to use of poor fund); *Provost & Magistrates of Glasgow v. John Barns* (1685) ScotCS, in 5 MORISON, *supra* note 81, at 2515 (explaining that citizens may challenge the town council's decision to forgive the debt of a former magistrate).

171. See *infra* notes 297–305 and accompanying text.

3. *The Problem of Preclusion.* Among the more remarkable features of Scots public law was its recognition that the public action could present a problem of preclusion. Public actions were thought to contemplate, in the words of Kames, that “any one person in Scotland”<sup>172</sup> might sue to enforce a public right; they necessarily presented the prospect that a single defender might be compelled to appear again and again.<sup>173</sup> The Court of Session dealt with the problem of possible duplication in practical terms. *Actio popularis* litigation was given some preclusive effect, but only as to suits brought by persons with the same interest in the matter as the original pursuer and only where it was equitable to do so.<sup>174</sup> Thus, the Scots law of preclusion barred some public litigation that was truly duplicative—for example, when the same claim was brought for the same reason—while still allowing those with different interests to vindicate their own rights.

Before explaining the operation of the preclusion rules as they applied to the *actio popularis*, this section sketches the Scottish law of preclusion, which differs somewhat from that with which American readers are familiar. Initially recognized as an equitable doctrine, preclusion had evolved by Kames’s day to allow a pursuer to offer “proof” that an issue in an earlier suit between the same parties had been resolved against the defender. Kames explained that this rule of preclusion was recognized “for the ease of the witnesses and for saving expence.”<sup>175</sup> The defender could raise whatever objections he had to

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172. KAMES, *supra* note 142, at 184.

173. English authorities bore the same concern. Thus, Sir Edward Coke worried about a “multiplicity of suits” in public actions and Sir William Blackstone explained that public actions were properly vested in a single public prosecutor to prevent the defendant’s harassment by “every subject in the kingdom.” Woolhandler & Nelson, *supra* note 13, at 702 (first quoting 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56a (London, W. Clarke & Sons 1853); and then quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*219). In light of these worries, English law sought to impose limits on the relators who could bring public actions. At common law, the statutory recovery went to the first plaintiff to file suit; later actions were subject to dismissal. See Winter, *supra* note 10, at 1407 n.191. Recognizing that such dismissal created an incentive for collusive initial litigation, common law courts held that collusion would deprive the first litigation of preclusive effect. See *id.*

174. In other contexts, a comparable form of nonmutual preclusion could be used offensively by different pursuers against a single defendant, thus preventing further litigation on an issue that had already been decided. See *infra* note 177.

175. KAMES, *supra* note 1, at 174. Although at common law “no proof is sustained but what is taken in preference of the judge,” equity allowed this practice. *Id.* In contrast to a process resolved against the defendant, in the case of a “decreet absolutor” in which the defendant wins, a court would allow a new action when new evidence became available or new law was relevant. *Id.* at 178–80. This was because “*res judicata* ha[d] no authority except with respect to the points determined; for so far only did the judge interpose his authority.” *Id.* at 180. More modern sources

the witness's testimony in the new lawsuit.<sup>176</sup> Thus, the Scots law of preclusion, at least in the eighteenth century, functioned in somewhat the same way as collateral estoppel or issue preclusion.<sup>177</sup>

The same-parties (or mutuality) requirement was not absolute. Kames observed that it was "frequently practiced" that proof was admitted offensively in cases with the same defendant but different plaintiffs,<sup>178</sup> although Kames cautioned against allowing serial suits against the same defender in cases where it would be inequitable.<sup>179</sup> Similarly, Kames warned against allowing such offensive proof with a different defender because such a defender has "had no opportunity to put cross interrogatories to the witnesses."<sup>180</sup> But even this restriction was not always obeyed. For example, Kames "observe[d] with regret" cases in which a superior landowner's right was invalidated, and then that judgment was given preclusive affect against lesser land claimants who had not been party to the original action.<sup>181</sup> Representatives of a pursuer were also considered fair game for preclusion.<sup>182</sup> A later source

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state the standard requirements of *res judicata* familiar to U.S. legal scholars and practitioners: "(a) a proper previous determination of the subject in question; (b) the parties to the second cause must be identical with, or representative of, the parties to the first cause, or have the same interests; (c) the subject-matter of the two actions must be the same; and (d) there must be identity of *media concludendi* or grounds of action in law or in fact." 12 *ENCYCLOPAEDIA OF THE LAW OF SCOTLAND*, *supra* note 33, at 550; *see* 10 *GREEN'S ENCYCLOPAEDIA*, *supra* note 117, at 287.

176. KAMES, *supra* note 1, at 174.

177. The law of the United States distinguishes between claim and issue preclusion. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982). The former bars claims that bear a transactional relationship to claims between the same parties that were previously resolved by a judgment on the merits; the latter treats an issue that was actually litigated and necessarily decided in earlier litigation as binding on the same parties in subsequent litigation. *See generally* ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* (2001) (reviewing claim and issue preclusion); DAVID L. SHAPIRO, *CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS* (2001) (same). Although a rule of mutuality once limited the operation of these doctrines to the parties and their privies, courts have come to recognize some forms of nonmutual issue preclusion. *See, e.g.,* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (allowing the use of nonmutual offensive collateral estoppel against a private party); *cf. United States v. Mendoza*, 464 U.S. 154, 162 (1984) (rejecting the use of nonmutual collateral estoppel against the government).

178. *See* KAMES, *supra* note 1, at 176, 182. For example, it was common practice, although not improper at law, to allow evidence of improper interference with a decedent's estate to migrate between suits against the same defendant but different plaintiffs. *Id.* at 175–76.

179. *Id.* at 183. For example, on equitable principles, preclusion should apply if multiple heirs serially sued on a claim arising out of an estate. *Id.*

180. *Id.* at 176.

181. *Id.*

182. *Id.* at 182.

notes that it had to be the case “that the parties to the second action represent the same interests as those in the first.”<sup>183</sup>

Title interacted with preclusion in complex ways. When “the new process [was] the same with the former [litigant], except as to the pursuer’s title,” there was not deemed to have been preclusion “in strict law.”<sup>184</sup> But, in equity, Kames thought preclusion should have applied due to the “principle of expediency” because, absent more evidence, a pursuer had “no reason to expect an alteration” and should not “distress” the defendant without some “rational prospect of success.”<sup>185</sup> Thus, as a formal matter, the same person could seemingly bring the same suit based upon the same evidence without any risk of preclusion, so long as the second action was based on different title. But in practice, things were more textured. Kames explained that courts of equity were to apply rules of preclusion to bar the second proceeding unless there was some “rational prospect of success.”

Adapting the private law of preclusion to public actions posed a challenge for the Court of Session. In *Comb v. Magistrates of Edinburgh*,<sup>186</sup> an action brought by brewers challenging a tax levied on beer, the magistrate-defenders argued that, because overseers appointed by Parliament could bring a suit regarding the taxes even after the brewers had sued, the brewers should not be able to bring their suit.<sup>187</sup> They argued that it was a maxim of Scottish law that “no person is bound to answer as a defender in any case, or with any pursuer where an absolutor will not afford him an *exceptio res judicata* against a similar process, raised at the instance of any other person.”<sup>188</sup> The Court of Session overruled this objection, saying that the objection did not apply regarding damages and a declarator to prevent repetition of the damages. In *Herriot’s Hospital*, the court recognized a similarly limited view of the preclusive effect of a proposed declaratory action on behalf of the public interest, saying “[t]hat inconveniency attends all popular actions, which however are known in the law of

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183. 10 GREEN’S ENCYCLOPAEDIA, *supra* note 117, at 291; *see also id.* at 312 (“The principle has further been recognised, that it is enough if the parties represent the same interest. In teind causes, a judgment against the common agent in a locality is *res judicata* against all the heritors.” (citations omitted)).

184. KAMES, *supra* note 1, at 181.

185. *Id.*

186. *Matthew Comb v. Magistrates of Edinburgh* (1794) ScotCS, in 5 MORISON, *supra* note 81, at 2540.

187. *Id.*

188. *Id.*

Scotland.”<sup>189</sup> Thus, the general requirement of preclusive effect, otherwise essential to make a matter justiciable, was (like title and interest to sue) sometimes set aside as a threshold matter to enable popular actions to proceed.

But in some circumstances, *actio popularis* decrees were given limited preclusive effect in subsequent litigation. The preclusive effect of an *actio popularis* was contingent on “sufficient identity of interest” between earlier and later litigants<sup>190</sup>:

The answer to the question as to whether there is such community of interest as to make a previous decision *res judicata* as against the parties to a subsequent action, would appear to depend largely upon whether there is or is not a contract expressed or implied between the parties to the proceedings or their authors or ancestors.<sup>191</sup>

In an action for the public right-of-way, “where certain parties appear or are called as representing the interests of the general public,” the general public is bound by the decision in the earlier suit. But an action by the magistrates of Edinburgh regarding use of a public market was not thought to preclude a second proceeding by members of the general public, apparently in recognition that there was no identity of interests.<sup>192</sup> Thus, the Court of Session found a middle ground between precluding all duplicative litigation and allowing *actio popularis ad infinitum*.

### C. Roman Influence on Scots Law

Although this brief survey does not capture the story in full, it offers an intriguing basis on which to assess the practices of the Court of Session in light of Roman law. By the mid-eighteenth century, the Scots had taken a more “relaxed” view of Roman precedents; that is, while Roman law furnished the foundation of Scottish law, the Scots had grown more confident in their own ability to evaluate and refine legal principles to take account of changes in their increasingly

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189. *Merchant Co. & Trades of Edinburgh v. Magistrates of Herriot’s Hosp.* (1765) ScotCS, in 8 MORISON, *supra* note 81, at 5752.

190. 10 GREEN’S ENCYCLOPAEDIA, *supra* note 117, at 292 (citing nineteenth-century cases).

191. *Id.*; see also LORD CLYDE & DENIS J. EDWARDS, JUDICIAL REVIEW 386 (2000) (“The decision in an *actio popularis* decided against one member of the public will be *res judicata* against all other members of the public.”).

192. 10 GREEN’S ENCYCLOPAEDIA, *supra* note 117, at 292.

commercial economy and society.<sup>193</sup> Eighteenth-century treatment of the *actio popularis* by the Court of Session shows some signs of this form of respectful adaptation.

Consider for comparative purposes the description of the Roman public action that appears in *Justinian's Digest*. The *Digest*, as translated by Alan Watson, includes the following entry under the heading, "Popular Actions":

Paul, *Edict*, book 8: We describe as a popular action one which looks to the public interest.

Paul, *Edict*, book 1: If more than one wish to bring the action, the praetor will choose the most suitable plaintiff.

Ulpian, *Edict*, book 1: But, if proceedings be brought more than once on the same ground, the common defense of *res judicata* will lie. In the case of popular actions, preference is given to the person who has an interest in bringing the proceedings.

Paul, *Edict*, book 3: A popular action is granted to a competent person, that is, one whom the edict allows to bring proceedings.<sup>194</sup>

Four intriguing features emerge from the *Digest's* account of the *actio popularis*: that individuals who were otherwise competent to litigate could bring public actions, that some system must be devised to select the most "suitable plaintiff," that some sort of "interest" might provide the basis on which to make such a selection, and that some form of preclusion must be recognized to protect defendants from the burden of repeated litigation.<sup>195</sup>

All four elements made their way into Scots practice, at least to some degree. Kames and others recognized that, in its purest form, the popular action was available to any "liege[]" in the country.<sup>196</sup> Kames sought to limit those who could pursue popular actions for fear that

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193. See Ewald, *supra* note 22, at 1101–02 (observing this more "relaxed" attitude in the mid-century work of John Millar, who viewed Roman law less as a set of prescriptive rules than as a source of historical analogues from which to reason, and in the work of Kames, who in his *Historical Law Tracts* treatise began to reflect about the expediency of the law).

194. 4 DIGEST OF JUSTINIAN, bk. 47, § 23, 793 (Alan Watson ed., 1985).

195. The Roman-law preference for the most suitable plaintiff may explain Kames's view that popular actions were unavailing in any case in which any "single person" had an adequate private interest to support a suit. See *supra* note 150. One finds modern echoes in some aspects of modern standing law, which has been described in relative terms. See Re, *supra* note 4, at 1196 (arguing that standing law enables courts to conduct a relativistic inquiry aimed at identifying plaintiffs with the greatest stake in securing the requested remedy).

196. See *supra* note 148 and accompanying text.



defenders would face the prospect of endless litigation. Although the Court of Session did not embrace Kames's restrictive view, it appears to have exercised some discretion in the matter. Thus, the court allowed the popular action in circumstances where one or more champions stepped forward on behalf of a group with a community of interest. The court also adapted its doctrine of preclusion to offer some assurance to defenders that those with a specific interest could mount but a single challenge to the actions in question. Finally, in emphasizing the need for *actio popularis* litigation to address the problems of the commons, the Court of Session would eventually turn away from bounty-driven litigation of the kind that persuaded many reformers to cut back on the scope of the *qui tam* action in England.<sup>197</sup>

## II. THE LESSONS OF SCOTS STANDING LAW

What lessons can one draw from this review of practice in the eighteenth-century Scottish Court of Session? No one would argue that the Scots invented standing law or that Scottish ideas were incorporated jot and tittle into Article III's definition of the judicial power.<sup>198</sup> To the contrary, the practice of the Court of Session and the *actio popularis* have, so far at least, played little role in the debates over the nature of the federal judicial power.<sup>199</sup> The tendency to ignore Scottish practice may reflect a variety of factors: the Supreme Court's own Anglo-centric tendency to invoke the courts at Westminster in defining the historical meaning of Article III, the relative dominance of Blackstone as a convenient source for those seeking an introduction to the English common law that shaped the Framers' legal world, a general tendency to ignore civil law and Scottish institutions, and the dearth of reliable case reports from the Scottish court system.<sup>200</sup> As Blackstone and English common law crowded out Scots law as a source in nineteenth-century litigation, Scottish practices slipped from view.<sup>201</sup>

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197. See *supra* notes 164–70 and accompanying text.

198. See generally ARTHUR L. HERMAN, *HOW THE SCOTS INVENTED THE MODERN WORLD* (2001) (cataloging the influence of Scots and the Scottish enlightenment, but making no claim about Scottish influence on American conceptions of judicial power).

199. The Israeli High Court of Justice, by contrast, has occasionally referred to the *actio popularis* in its discussions of standing doctrine. See HCJ 910/86 Ressler v. Ministry of Defence 42(2) PD 441, 442 (1988) (Isr.).

200. For criticisms of the quality of Morison's reports, see *supra* note 143.

201. For the development of these ideas, see Pfander & Birk, *Scottish Judiciary*, *supra* note 20, at 1625, 1685. That work discusses the possibility that Scots legal institutions may have had a

Despite the lack of direct transplantation, the Scots' experience may have important lessons to teach about the way a court might use the law of standing as a judicially managed restriction on otherwise far-reaching equitable authority. As a matter of history, courts of equity exercising civil law authority may have been forced to confront the need to establish limits on the scope of their judicial power.<sup>202</sup> Courts of law, particularly those working within the parameters of the writ system in England, were more closely tied to the rights of action embedded in the writs.<sup>203</sup> While common law courts could expand their jurisdiction through fictions and recognize new claims for which particular writs would lie, they rarely faced the unbridled claim to do justice in the absence of any other remedy.<sup>204</sup> This last-resort remedial function fell to the courts of equity and—particularly in Scotland—to the Court of Session, which faced in its sharpest form the challenge of defining limits to judicial power in a world with other institutional actors.<sup>205</sup>

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greater impact on the way the framers structured the federal judiciary under Article III than on the content of nineteenth-century American common law.

202. In the English High Court of Chancery, by contrast, open-ended petitions to do right by the parties had given way to the more structured forms of common law pleading and remedies that characterized the eighteenth century.

203. See Carol Harlow, Gillick: *A Comedy of Errors?*, 49 MOD. L. REV. 768, 769 (1986) (noting that in England, concepts of *locus standi* were included in the common law and varied according to the remedy sought).

204. For more on the use of fictions, see BAKER, *supra* note 39, at 47–49 (describing fictions used by English courts to expand their jurisdiction). For a discussion of the challenges posed by a broad right to petition for judicial review, see generally Harlow, *supra* note 203. Harlow explores the problems created by England's all-purpose action for a declaration of rights, which enables petitioners to contest matters of public administration when they lack the private interest necessary to confer standing. *Id.*

205. It may be that the English courts of equity, similarly charged with providing remedies when the common law ran out, felt similar pressure to articulate limits on the right to sue. But doctrinal limits on the scope of equitable power may have alleviated that pressure. One leading treatise, for example, regarded the principles by which courts of equity acted as “very well settled.” 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 20, at 20 (W.H. Lyon, Jr. ed., 14th ed. 1918) (quoting Lord Redesdale). Those settled principles held that antisuit injunctions fell within the concurrent jurisdiction of courts of equity and courts of law, which shared authority over matters of property and contract, and would issue to vindicate three defenses: fraud, mistake, and accident. 2 STORY, *supra*, § 1198, at 562; see also 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 136–40, at 186–94 (Spencer W. Symons ed., 5th ed. 1941) (affirming that equity sorted proceedings into three categories: concurrent (with jurisdiction shared between courts of law and equity); exclusive (such as matters of trust administration that only courts of equity handled); and auxiliary (including bills of discovery and bills of peace)); *id.* § 188, at 269–70 (including accident, mistake, and fraud as the bases for equity's concurrent jurisdiction over antisuit injunctions). England did not adopt the all-purpose declaratory-judgment action until the middle of the nineteenth century, and it did not take root

Three lessons emerge from the Court of Session's struggle to define a Scottish law of standing. First, the Scots' doctrine of title and interest to sue provides additional evidence that private litigation necessitates an inquiry into standing. Indeed, title and interest bear more than a passing resemblance to the concepts of *injuria* and *damnum*, which played a role in Founding-era debates about the right to sue in the courts of the United States.<sup>206</sup> Second, the Scots' acceptance of the *actio popularis* proceeding suggests that public actions were seen as a very different matter from private litigation; to ensure that public authorities complied with the law, the Court of Session was forced to consider how far to go in relaxing the strict rules of standing that governed private matters. Third, the Scots' concern with giving preclusive effect in public law actions, echoes of which one finds in the writings of Coke and Blackstone,<sup>207</sup> provides one reason why courts might choose to separate their standing law from an inquiry into the merits. It thus may invite a closer look at the proposal, widely shared among scholars, to collapse the two inquiries.<sup>208</sup> After taking a comparative look at these developments, this Part interrogates modern currents in standing law and scholarship.

#### A. Scots Standing Law: A Comparative Look

Scots law provides a novel point of comparison for scholars exploring the development of standing law in the United States. Part II.A examines the Scottish constructs of title and interest to sue, the *actio popularis*, and the doctrine of preclusion. It also finds a series of surprising connections to work that has been done on the historical evolution of standing law in the United States.

1. *Title and Interest To Sue.* The Scottish constructs of title and interest to sue bear more than a passing resemblance to the Latin terms *injuria*, the invasion of a legal right, and *damnum*, a real-world harm.

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there until the 1880s. See *Developments in the Law: Declaratory Judgments—1941–1949*, 62 HARV. L. REV. 787, 790 (1949) (tracing the English declaratory judgment to the Chancery Procedure Act of 1852 and to the exercise of rule-making authority in 1883).

206. See *infra* note 210 and accompanying text.

207. See *supra* note 173.

208. Among the prominent scholars who have endorsed such an integration of standing and the merits, see Fletcher, *supra* note 42, at 239, who suggests that standing be regarded as a merits question to be resolved under applicable substantive law, and David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 41–47. Many scholars have interpreted the Supreme Court's recent decision in *Lexmark* as a partial endorsement of the suggested joinder of standing and the merits.

The Scots required that both title and interest be present to support private litigation; Kames proclaimed that “*right* without *interest* [would] not be sustained in a process, . . . as little will *interest* without *right*.”<sup>209</sup> The Kames formulation tracks the English idea that certain genuine harms (*damna*) might not arise from a litigable invasion of the plaintiff’s legal rights (*injuria*). English jurists thus spoke of *damnum absque injuria* to capture the idea that a party might suffer a genuine loss without having suffered the legally actionable injury that would support litigation.<sup>210</sup> In Scottish terms, the pursuer might have a pecuniary interest without having title to sue.

Similar ideas were reflected in early American restatements of the law governing the right to maintain an action.<sup>211</sup> Justice Story viewed the right to sue as necessarily entailing both elements: “[T]o maintain an action, both [wrong and damage] must concur; for *damnum absque injuria*, and *injuria absque damno*, are equally objections to any recovery.”<sup>212</sup> John Bouvier’s American law dictionary drew the same connection.<sup>213</sup> Woolhandler and Nelson have invoked these authorities in arguing that some personal interest or stake was required.<sup>214</sup>

Other scholars observe that, at least in some circumstances, it would suffice for the plaintiff to show an invasion of a legal right (*injuria*) without any accompanying damage or harm. Thus, Professor Andrew Hessick argues that, at least in trespassory tort claims, the legal invasion itself implied a harm that would suffice to make the

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209. KAMES, *supra* note 1, at 213.

210. See, e.g., *Ashby v. White* (1703) 87 Eng. Rep. 808, 810–11 (Gould, P.J.) (“[A]n *injuria sine damna* . . . will not bear an action, for both must necessarily concur to maintain the action; for things must not only be done amiss, but it must redound to the prejudice of him that will bring his action for it.”), *rev’d*, 91 Eng. Rep. 665; *Cable v. Rogers* (1625) 81 Eng. Rep. 259, 259 (Dodderidge, J.) (“[I]n *injuria* and *damnum* are the two grounds for the having all actions . . . : if there be *damnum absque injuria*, or *injuria absque damno*, no action lieth . . .”). *Ashby* was overturned by the House of Lords, apparently vindicating Lord Holt’s dissent. See Woolhandler & Nelson, *supra* note 13, at 719 n.146.

211. See 6 DANE, *supra* note 40, at 589 (observing that unless the plaintiff shows by his bill “sufficient title or equity,” the defendant’s demurrer should be sustained). Dane appears to be referring to the plaintiff’s title to property at the center of the dispute, rather than identifying a general threshold requirement comparable to that in Scotland.

212. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 236 (Boston, Little & Brown 1839). Woolhandler and Nelson suggest that Justice Story may not have been entirely consistent on the point. See Woolhandler & Nelson, *supra* note 13, at 719 n.146.

213. 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 636 (4th ed. 1852) (“Injury without damage or loss will not bear an action.”).

214. See Woolhandler & Nelson, *supra* note 13, at 719 n.146.

invasion actionable.<sup>215</sup> In support, Hessick cites Lord Holt's later-vindicated dissent in *Ashby v. White*<sup>216</sup>: "[S]urely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right."<sup>217</sup> Hessick also points to defamation claims, where the reputational injury was presumed, and nominal-damages claims, where the invasion itself gave rise to an action.<sup>218</sup> Other scholars have reached similar conclusions about the traditional willingness of courts to hear claims without invariably demanding a showing of formal injury.<sup>219</sup>

Although the modern Supreme Court has wrestled with how best to apply its injury rule in the context of federal statutory rights to sue,<sup>220</sup> we find little evidence that nineteenth-century American law formally incorporated the Scottish ideas of title and interest as a threshold limit on a pursuer's right to sue. Some nineteenth-century decisions nonetheless informally emphasized the importance of concepts like title and interest as a limit on the judicial power and did so, perhaps not surprisingly, in the context of suits brought in equity. In *Georgetown v. Alexandria Canal Co.*,<sup>221</sup> for example, the Supreme Court affirmed the dismissal of the city's bill to enjoin as a public nuisance the construction of an aqueduct on the Potomac River.<sup>222</sup> The

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215. F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280–84 (2008).

216. *Ashby v. White* (1703) 87 Eng. Rep. 808, *rev'd*, 91 Eng. Rep. 665.

217. Hessick, *supra* note 215, at 282 (quoting *Ashby*, 87 Eng. Rep. at 816 (Holt, C.J., dissenting)).

218. *Id.* at 307.

219. Fletcher, *supra* note 42, at 249; Sunstein, *supra* note 10, at 171; Winter, *supra* note 10, at 1397.

220. The Court clarified matters a bit in *Spokeo Inc. v. Robins*, holding that plaintiffs seeking to enforce a congressionally conferred right of action must allege an injury that is both concrete and particularized. *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Although the Court vacated and remanded the lower court's decision that injury would presumptively flow from any particularized statutory violation, the Court's analysis left ample room for the plaintiff to bring his claims within the standard announced for allegations of injury. *See id.* at 1549–50. A bare procedural violation in the company's collection and dissemination of credit information would not do, but the Court nonetheless confirmed the viability of claims of a procedural violation where the plaintiff suffers intangible injuries of the kind with which Congress was concerned. *Id.* In evaluating intangible injuries for concreteness, the Court explained that it was "instructive" to consider the kinds of harms that have traditionally been regarded as legally cognizable in assessing the viability of claims of de facto injury that Congress has "elevate[d]" to the status of cases and controversies. *Id.* at 1549.

221. *Georgetown v. Alexandria Canal Co.*, 37 U.S. 91 (1838).

222. *Id.* at 92–93.

Court observed that public nuisances were subject to challenge in a variety of proceedings: by criminal indictment, by private suit for damages brought by one who has suffered special damage, and by information filed by the attorney general.<sup>223</sup> In light of these modes of redress, equity would take cognizance of a bill to enjoin a nuisance only when brought by a private person who faces “an imminent danger of suffering a special injury.”<sup>224</sup> No averment of special injury appeared in Georgetown’s bill. In any case, the Court found that the city could not represent the interests of any private parties who might sue to enjoin the nuisance; the city and its officials did not have the sort of “interest as enables them to sue in their own name.”<sup>225</sup>

A similar inquiry took place a century later in connection with an evaluation of the right of a railroad company to pursue injunctive relief against a merger of competing roads that would curtail its ability to compete for business in the Chicago area. According to the Court, the defendants “contend[ed] that the plaintiffs ha[d] not the legal interest necessary to entitle them to challenge the order.”<sup>226</sup> But the Court rejected this contention, observing that the merger had already inflicted losses worth \$10 million.<sup>227</sup> Having found sufficient interest, the Court evaluated the plaintiffs’ claim of right or title.<sup>228</sup> It found that the federal law governing transportation “entitled” the plaintiffs to “equality of treatment.”<sup>229</sup> As proper parties to the proceeding before the Interstate Commerce Commission, the plaintiffs were viewed as entitled to seek review in equity of the agency’s order permitting the merger to proceed.<sup>230</sup>

Scholars contest the significance of the nineteenth-century cases along several dimensions. Woolhandler and Nelson treat the early nineteenth-century nuisance cases as articulating a body of law that governs “standing” to seek civil remedies for the violation of public rights, arguing that equitable doctrines served as precursors to constitutional developments.<sup>231</sup> But Professor Steven Winter argues that the rules governing suit for public nuisance, such as those involved

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223. *Id.* at 97–98.

224. *Id.* at 98.

225. *Id.* at 100.

226. *Baltimore & O.R. Co. v. United States*, 264 U.S. 258, 266 (1924).

227. *Id.*

228. *Id.*

229. *Id.* at 267.

230. *Id.* at 266–67.

231. Woolhandler & Nelson, *supra* note 13, at 701.

in *Georgetown*, were simply understood as part of the substantive law of equitable remediation, rather than a constitutionally based standing doctrine that expressed a “purely procedural concept.”<sup>232</sup> This characterization appears to conform in part to the view of at least some Scots who regarded title and interest to sue as a matter that could vary depending on the nature of the claim.<sup>233</sup>

Recent scholarship contends that the law of standing as administered by the Supreme Court may well depend on the context in which the claim arises. Professor Evan Lee and Josephine Ellis argue that the Court requires less by way of injury-in-fact in cases in which litigants sue to enforce procedural rights conferred by Congress than it does in other forms of litigation.<sup>234</sup> More generally, Professor Richard Fallon identifies an “accelerating trend toward doctrinal fragmentation,” in which specialized rules of standing apply to specific forms of litigation.<sup>235</sup> Fallon shows that this fragmentation stands in tension with the Court’s own aspiration to “conceptual unity,” in which a uniform body of standing law would apply with equal force to claims of all sorts.<sup>236</sup> Perhaps the fragmentation that Lee, Ellis, and Fallon identify represents a return to the roots of a standing inquiry that depends on the particulars of the legal claim being asserted.

Apart from the factors that help explain the fragmentation of standing, the Court may be using Article III to reclaim a judicial role in tailoring rights to sue in a world increasingly populated by statutes. The Court has taken a well-known turn against the recognition of judge-made rights of action, preferring that Congress take the lead in

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232. Winter, *supra* note 10, at 1419, 1422 (characterizing the standing inquiry in early cases as one “into the merits” and noting that it was not until much later that standing was understood as a “purely procedural concept”).

233. See DAVID MAXWELL, *THE PRACTICE OF THE COURT OF SESSION* 149 (1980) (“Title to sue in any particular case, being a matter of the substantive law, should be sought in specialist works on the subject . . . .”); 1 SHAND, *supra* note 105, at 169 n.1 (“A title to pursue applies to particular actions, and requires, besides the general qualification of having a persona standi, that the party have both a title and an interest to urge the particular suit.”).

234. See Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 174 (2012).

235. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1063 (2015). Focusing on what the Court does, Fallon identifies ways in which the bite of the injury requirement varies from claim to claim. See, e.g., *id.* at 1071–75, 1077–79 (identifying differing applications of the injury requirement to claims in the Establishment Clause and national security contexts, among others).

236. *Id.* at 1067.

authorizing private suits in federal court.<sup>237</sup> Such congressional primacy complicates the task of maintaining judicial control over the viability of particular claims, a task that common law courts had traditionally performed in connection with determining whether particular forms of action could be adapted to new circumstances.<sup>238</sup> Although the Court can tailor suability to some degree through statutory interpretation,<sup>239</sup> the broad citizen-suit provisions of some statutes like those governing environmental protections leave less room for the role of interpretation. The Court's use of Article III to justify its refusal to give effect to such a provision in *Lujan v. Defenders of Wildlife*<sup>240</sup> thus represents a reassertion of judicial control.<sup>241</sup>

A similar bid for judicial control may underlie the Court's decision in *Armstrong v. Exceptional Child Center, Inc.*<sup>242</sup> Treating the right to seek the judicial invalidation of preempted state law as a matter governed by the flexible provisions of federal equity, the *Exceptional Child* Court neatly broadened its own authority to determine the viability of similar litigation in future cases.<sup>243</sup> It thus avoided the rigidity that might have resulted had it affirmed the Ninth Circuit's conclusion that the right of action in question was an unbending implication of the Supremacy Clause.<sup>244</sup> *Exceptional Child* illustrates one overlooked advantage of the judge-made right of action: that reliance on such a construct allows the Court to maintain some control

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237. See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 160 (2008) (refusing to recognize an implied right of action); cf. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment))).

238. For more on the evolution of the forms of action at common law, see generally BAKER, *supra* note 39. For the Court's view that judges can tailor congressional rights of action only through the use of constitutional, rather than judge-made or prudential, standing limits, see generally *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

239. See *Lexmark*, 134 S. Ct. at 1392–95 (concluding that, under ordinary rules of statutory interpretation, the plaintiff was entitled to bring suit under the Lanham Act for false advertising).

240. *Lujan v. Defs. of Wildlife*, 505 U.S. 555 (1992).

241. See generally *id.* (declining to recognize plaintiffs' standing to challenge environmental consequences overseas without a more concrete connection to the endangered species and habitat).

242. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015).

243. See *id.* at 1384 (explaining that the right to seek relief from preempted state law "is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England").

244. *Exceptional Child Ctr., Inc. v. Armstrong*, 567 F. App'x 497 (9th Cir. 2014) (citing *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008)), *rev'd*, 135 S. Ct. 1378 (2015).



over who can sue and in what circumstances, without having to deploy constitutional limitations. But that very feature appears inconsistent with the Court's rejection of judge-made prudential standing limits in *Lexmark*.<sup>245</sup>

2. *The Private/Public Distinction.* The Scottish *actio popularis* may shed new light on a longstanding debate among American scholars as to the significance of the private litigation model as distinct from what has been variously called the “public action,”<sup>246</sup> “public law litigation,”<sup>247</sup> or “special function” model.<sup>248</sup> Views about these models differ, of course, but one finds broad agreement about some distinguishing considerations. Private rights, the stuff of ordinary litigation between individuals, derive from common law and statutory entitlements. Parties bring suit to vindicate these rights, seeking traditional forms of relief like damages and injunctions. For much of the nineteenth century, private law litigation provided the crucial testing ground for claims of statutory right as well as the primary vehicle for the assertion of constitutional claims, which often arose incidentally in the course of litigating private claims. *Marbury v. Madison*<sup>249</sup> may typify the category, arising as a mandamus action to secure a personal right to judicial office and presenting, as some would say, an incidental question as to the constitutionality of a federal law.<sup>250</sup>

For the most part, scholars agree that the private rights model of litigating constitutional rights has given way to a public rights model, but disagree about what that means for the law of standing. Within a public rights model, scholars frankly acknowledge the role of the

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245. See *Lexmark*, 134 S. Ct. at 1388 (“Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, . . . it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”). For a discussion of the tension between *Exceptional Child* and *Lexmark*, see Henry P. Monaghan, *A Cause of Action Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1821 (2016). As Monaghan notes, “Despite the current Court’s hostility to implied rights of action, we have a longstanding tradition of suits against officers seeking equitable or declaratory relief for alleged wrongful conduct.” *Id.*

246. Jaffe, *Citizen Litigant*, *supra* note 9, at 1033.

247. Chayes, *supra* note 8, at 1281.

248. Monaghan, *supra* note 49, at 1368–71.

249. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

250. See Monaghan, *supra* note 49, at 1365–67 (describing *Marbury*, in the nineteenth-century mind, as exemplifying the private rights model of constitutional adjudication, and contrasting that model with a special-function approach that emphasizes the Court’s role in the law’s exposition); cf. Pushaw, *supra* note 47, at 500–01 (treating *Marbury* as a public law action in which the Court played an expository role in declaring constitutional meaning).

federal courts and Supreme Court in constitutional adjudication.<sup>251</sup> The common law forms of action no longer structure litigation, which now primarily focuses on the elaboration of public law norms.<sup>252</sup> Parties assert constitutional claims directly, rather than incidentally, often in actions seeking declaratory and injunctive relief.<sup>253</sup> Sovereign immunity presents no barrier to the direct assertion of claims against governmental bodies, at least as long as the parties name government officers as defendants.<sup>254</sup> We have become increasingly familiar with the judicial enforcement of public or group interests in suits brought by “individuals and groups who may or may not be the direct beneficiaries of the judgment.”<sup>255</sup>

For some observers, the slow erosion of the private rights model and the rise of the public action model call for a rethinking of the rules of standing. In arguing for relaxed standing rules, Jaffe and Berger both emphasize the acceptance of some public actions in English law.<sup>256</sup> Professors Cass Sunstein and Steven Winter have made similar arguments.<sup>257</sup> Even as early as 1973, Professor Henry Monaghan had come to see the transformation as essentially complete. Although courts continue to require injury-in-fact or personal interest, following the vestiges of the private rights model, Monaghan found that “the concept has been so diluted that even the most trivial interest will suffice.”<sup>258</sup> Coupled with the rise of the class action as a tool of constitutional adjudication, Monaghan called for a frank embrace of the public rights model and a thorough reconceptualization of the various rules governing the right to sue.

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251. See generally Chayes, *supra* note 8 (discussing the elements of public law litigation).

252. See, e.g., Pushaw, *supra* note 47, at 476–82 (describing the norm-elaboration role of the federal courts in matters governed by federal law); see also FALLON ET AL., *supra* note 3, at 74–75 (describing a “law declaration” model of adjudication).

253. For more on the centrality of the action for injunctive and declaratory relief in constitutional adjudication, see generally Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006).

254. See generally Pfander & Dwinnell, *supra* note 53 (highlighting the Eleventh Amendment’s inapplicability to suits against state officials for injunctive and declaratory relief and proposing that state courts authorize follow-on actions for money against state governments).

255. Monaghan, *supra* note 49, at 1369 (quoting Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 774 (1972)).

256. See generally Berger, *supra* note 9 (cataloging situations in which those with no injury in fact were permitted to bring suit); Jaffe, *Standing to Secure*, *supra* note 9 (same).

257. See *supra* note 219 and accompanying text.

258. Monaghan, *supra* note 49, at 1382.

Remarkably, practice in the Scottish Court of Session provides a window on what such a reconceptualized world might resemble. By the eighteenth century, Scottish public law displayed the features that Monaghan later identified as hallmarks of the public rights model of litigation: a reliance on the declaratory-judgment proceeding to test the legality of government action directly, a relaxation of the rules of sovereign immunity that enabled the public to interplead directly with the Crown by suing its officers, and a rethinking of the rules of standing that enabled parties to pursue “public” or “popular” actions in the Court of Session. As we have seen, the Scots frankly distinguished between “private” actions and public or popular actions. Although title and interest fully applied to determine the standing of individuals to pursue private claims, the Court of Session did not insist on title and interest in connection with certain *actio popularis* or popular actions.<sup>259</sup>

The Scots’ handling of the *actio popularis* offers a range of comparative insights into modern standing law. True, the rights in question were not avowedly constitutional in the modern American sense. But in many instances, the public was invoking rights held in common as a matter of immemorial custom. Thus, the eighteenth-century authorities tended to recognize the viability of the *actio popularis* to establish a right to allow animals to graze freely on public lands, to navigate public streams, and to transport goods along public roads.<sup>260</sup> In all such instances, the individuals invoking the customary right of the commons suffered a diffuse harm that equally affected many of their friends and neighbors. Though no particular individual necessarily suffered a form of special damage (interest) and though none, by definition, “owned” the public right in question (title), a declarator action enabled the court to clarify rights for both pursuers and defenders.

The Scots’ willingness to permit such public rights proceedings, often by individuals affected by the prospective loss of a public good, provides an obvious analog to American environmental-standing cases. In the modern environmental-standing case, plaintiffs articulate an interest (albeit one held in common with others) in the public good

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259. See *supra* Part I.B.2.

260. 1 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND, *supra* note 30, at 85–86 (noting that the *actio popularis* was available for seeking a “declarator of a public right of way, a right of market, a declarator that the navigation of a public navigable river should not be obstructed, a declarator of common use and enjoyment by the public of a piece of land, for removal of a public danger, or nuisance, or to prevent the building of a bridge across a public street by proprietors on opposite sides of the street, and the like”).

of clean air, clean water, pristine public lands, or the preservation of endangered species.<sup>261</sup> Thus, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,<sup>262</sup> the plaintiffs living in the region were said to have a “reasonable concern” that factory pollution would lessen their willingness to swim downriver from the site or to picnic or birdwatch in the area.<sup>263</sup> Similar cases abound.<sup>264</sup> But the Court has refused to recognize the standing of those who lack a personal connection to the threatened species or environment or habitat that lies at the center of the dispute. Thus, in *Lujan*, plaintiffs in the United States were said to lack the requisite injury for standing purposes because they could not show the threat of an imminent loss; they simply were too far away from the habitats of the Nile crocodile and the Asian elephant to face the concrete injury said to be required.<sup>265</sup> This requirement of territorial connection calls to mind Kames’s warning in *Selkirk* that the recognition of a public action would mean, at least in theory, that “any one person in Scotland” could bring the action.<sup>266</sup> One way to address this concern with far-flung rights to sue was to define the relevant community more narrowly, to include only those pursuers who could plausibly claim to have a stake in continued protection of a common resource.<sup>267</sup> Roman law encourages such selectivity, observing

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261. Economists teach us that public goods display jointness and nonexcludability, in that all members of a given society can consume the good and cannot be prevented from doing so. But, although some public goods (say, national defense) do not necessarily give rise to a tragedy of the commons problem, others do. For example, the unfettered right to dump waste into a river may harm the river for other uses. For an overview of the rules of environmental standing, see generally Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931 (1998) (noting the way in which the Court’s injury-in-fact analysis has tended to focus attention on the human dimension of environmental issues).

262. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

263. *See id.* at 183.

264. *See generally, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1973) (recognizing recreational and aesthetic interests as sufficient to confer standing on the members of an environmental group who have direct connections to the site in question).

265. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 495–97 (2009) (concluding that the members’ general practice of regularly visiting national parks was insufficient to warrant standing to challenge a forest service action that facilitated the sale of timber on specific lands).

266. *See supra* text accompanying note 143.

267. *See supra* text accompanying note 108. In contrast to Kames, MacLaren viewed the right to sue as extending to “any member of the community”—which was perhaps a reference not to Scotland as a whole but to the community that benefited from the public good at issue. *See supra* text accompanying note 163.

that in choosing one plaintiff to pursue an *actio popularis*, the praetor may rely on the relative interest of the parties.<sup>268</sup>

The Scots' practice also includes analogs to the controversial citizen or taxpayer suit. In the United States, the Supreme Court has largely rejected such proceedings, characterizing them as generalized grievances shared in common by all and actionable by none.<sup>269</sup> Critics of this restriction on taxpayer standing worry that standing law may have the effect of shielding from scrutiny practices (such as the transfer of government funds to religious organizations) that might well violate the Constitution if the Court were to reach the merits.<sup>270</sup> But the defenders of limits on taxpayer standing observe that some filters might be appropriate to limit suits to enforce certain constitutional rights, especially those that affect a broad range of people in different ways.<sup>271</sup> The cases thus invite a debate over the nature of the rights in question and the proper role of the federal judiciary.

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268. See *supra* note 194 and accompanying text. Professor Robert Pushaw argues that chance should play a role in the selection process, at least in environmental litigation. See Robert J. Pushaw, Jr., *Fortuity and the Article III "Case": A Critique of Fletcher's The Structure of Standing*, 65 ALA. L. REV. 289, 293 (2013) (arguing that an Article III "case" requires a plaintiff to show that his federal legal rights have been violated fortuitously, that is, "involuntarily as a result of a chance occurrence" beyond his control); Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 11 (2010) (same).

269. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011) (denying taxpayer standing to challenge a tax credit that reduced the tax liability of parents whose children attended religious schools); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (denying taxpayer standing to challenge the executive branch's discretionary decision to spend money on certain faith-based initiatives); *United States v. Richardson*, 418 U.S. 166, 170 (1974) (denying citizen standing to challenge the secrecy of the federal budget as it applied to the Central Intelligence Agency); *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (denying taxpayer standing to challenge a congressional appropriation of money); cf. *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (permitting a taxpayer to challenge a federal statute that specifically appropriated funds to a religious enterprise).

270. See *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 160–61 (Kagan, J., dissenting) (arguing that taxpayers have the same interest in avoiding the use of public funds for religious purposes, regardless of whether the expenditure takes the forms of a direct subsidy or a tax credit); see *Hein*, 551 U.S. at 593 (denying taxpayer standing to challenge the executive branch's decision to use appropriated funds for religious purposes).

271. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 314 (1979) (arguing that broad standing may empower those with a less substantial interest to establish precedents that undercut the rights of those more directly concerned); Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1679–83 (2007) (explaining that individuals jointly affected by an apparent constitutional violation may prefer to waive their right rather than enforce it, and exploring the threat posed by broad-based standing to the effectiveness of such waivers).

Similar questions arose in Scotland, although they seem to have been resolved in favor of permitting some forms of citizen-suit litigation. In *Minister of Cambuslang*, the interest of the pursuers arose from their obligation to support the poor, thereby giving them an undivided stake (however small on an individual basis) as taxpayers in the amounts withdrawn from the parish poor fund.<sup>272</sup> In *Herriot's Hospital*, the pursuers had no direct interest in the land in question; they were members of the community served by the hospital and thus had only an indirect interest in its financial well-being.<sup>273</sup> In both instances, the affairs of the institution were controlled by a board of overseers on which the pursuers did not serve. They could thus claim at most a kind of general interest in the proper handling of a public body's finances. Still, these generalized grievances were sufficient to persuade the Court of Session to allow the actions to proceed.

Intriguingly, however, the court's willingness to entertain such claims occasioned some of the same sort of criticism that underlies the Supreme Court's refusal to allow generalized grievances. As Kames observed in *Selkirk*, other institutions of government (beside the Court) can oversee a local body's financial affairs. Both the Court of Exchequer and the body's own board members were thought to have had the power to conduct such investigations. By permitting the Court of Session's insertion into the oversight process at the behest of anyone who chose to sue, the litigation could potentially produce decisions in conflict with those of other institutions.<sup>274</sup> In any case, the problems with informer proceedings throughout Europe suggested to Kames that Scotland should embrace them only with legislative authorization.<sup>275</sup> Justice Harlan adopted essentially the same view two hundred years later, when he argued against the judicial recognition of the limited form of taxpayer standing upheld in *Flast v. Cohen*.<sup>276</sup>

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272. For an overview of *Herriot's Hospital*, see *supra* notes 131–34 and accompanying text. Notably, in *Frothingham v. Mellon*, the Supreme Court confirmed the viability of taxpayer suits directed at local institutions, even as it ruled out such suits aimed at national practices that were supported by millions of taxpayers. *Frothingham*, 262 U.S. at 486.

273. See *supra* notes 137–41.

274. As noted above, the Court of Session attempted to moderate the conflict by respecting the Court of Exchequer's primacy in general accounting of local books and by limiting its own role to suits brought by individuals to contest specific acts of wrongdoing. See *supra* note 130.

275. See *supra* note 166 and accompanying text.

276. See *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (Harlan, J., dissenting) (arguing that taxpayer standing should be permitted only when authorized by Congress). Reliance on Congress may present other problems, however, and may necessitate some leadership on the part of the Court. See Fletcher, *supra* note 42, at 224 (questioning the wisdom of a congressional role in calibrating

3. *Standing and Nonparty Preclusion.* The Court of Session's efforts to articulate a body of preclusion law in the context of evaluating a pursuer's title and interest to sue also deserve a comparative comment or two. The court's concern with preclusion helps to explain why it chose to maintain a body of standing law that was separate from the merits. Only a party with title and interest to sue could put a particular claim into issue such that the disposition would bind both the pursuer and the defender. Otherwise, the defender could not invoke the prior decree as a bar to subsequent litigation. Concern with preclusion thus explains why the Court of Session regarded the matter of standing as a defense that was to be raised at the threshold and did not go to the merits of the claim. The separation of preclusion and merits was essential if the proper party's right to sue was to be protected.

The court's concern with preclusion was not limited to private litigation, but also extended to the *actio popularis* proceeding. As we have seen, the court would ascribe preclusive effect to the first public action that went to judgment, so long as there was a sufficient community of interest between the first pursuers and the second pursuers.<sup>277</sup> In applying that approach, the court seems to have focused on the nature of the interest being asserted in the litigation. Thus, in a public action to establish a right of way, the claim on behalf of the general public was said to be precluded by earlier litigation brought on behalf of the public.<sup>278</sup> The practice in Scotland appears at least somewhat similar to that in England, where preclusive effect attached to the first judgment in informer and relator proceedings and barred subsequent actions including those brought by the Crown itself.<sup>279</sup>

The Scots' willingness to consider preclusion in public actions opens up a new area of scholarly inquiry. To date, scholarship on the law of standing in the United States has largely ignored the subject of nonparty preclusion. To be sure, scholars have considered the possibility that a plaintiff without a sufficiently concrete stake in the matter might fail to press the claim effectively and thus undermine the prospects for successful recognition of a new claim or legal right. The

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issues of standing to sue for constitutional violations); Pushaw, *supra* note 47, at 511–12, 524 (same).

277. See *supra* notes 190–92 and accompanying text.

278. See *supra* notes 190–92 and accompanying text.

279. On the binding quality of the first informer proceeding, see 3 BLACKSTONE, *supra* note 16, at \*160 (treating the verdict in an informer proceeding as a “bar to all others, and conclusive even to the king himself,” except in cases of collusion).

possibility of such feckless litigation has been viewed as a possible justification for the Supreme Court's insistence on limiting standing to those with a genuine stake in the matter.<sup>280</sup> Other scholars have questioned these concerns, noting that the Court will have the final say as to the content of federal law and will doubtless be well informed (by the parties' briefs, amicus briefs, bench memos, and lower court decisional law) on the subject.<sup>281</sup> For the most part, scholars have examined these potential consequences through the lens of stare decisis.<sup>282</sup> Until recently, no one seems to have taken up the Scots' suggestion that some form of nonparty preclusion should as a general matter bar a second proceeding.<sup>283</sup>

This gap in standing literature doubtless reflects important differences in institutional structure. Because the Court of Session acted as a court of original and final jurisdiction in *actio popularis* proceedings, interested parties were likely to have regarded the first such proceeding as the main event for obvious reasons. Once the Court of Session had decided the issue at the behest of one or more members of the public, it was unlikely to reach a different conclusion in a subsequent action brought by a different group of pursuers. In this sense, then, prior decisional law could ascribe decisive effect to the first decision as a practical matter, even if the law of stare decisis did not

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280. See Brilmayer, *supra* note 271, at 314 (arguing that insufficiently interested litigants may fail to pursue claims with the vigor necessary to help shape the law).

281. Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1708 (1979) (questioning the premise that interested litigants pursue claims more vigorously than ideological litigants and pointing to the range of information from which courts draw when fashioning rules of decision).

282. See Brilmayer, *supra* note 271, at 304–06 (emphasizing the role of stare decisis); Kontorovich, *supra* note 271, at 1712 (emphasizing the role of precedent in evaluating standing law and noting the inapplicability of issue preclusion); Tushnet, *supra* note 281, at 1708 (same).

283. Professor Lea Brilmayer argues that stare decisis could produce results comparable to preclusion. See Brilmayer, *supra* note 271, at 308–09; see also Kontorovich, *supra* note 271, at 1712. But Brilmayer assumes that nonparty preclusion would be inappropriate and argues from that premise against the preclusive effects of stare decisis. In an important article on standing, Professor Seth Davis explores the connection between standing doctrine in actions on behalf of the public and the law of preclusion. See Davis, *supra* note 46, at 643–44 (concluding that when Congress authorizes a private individual to stand for the public, the executive may be precluded from any further litigation by the result); see also Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 655 (2005) (exploring preclusion principles in the context of follow-on litigation of public rights); cf. Woolhandler & Nelson, *supra* note 13, at 724 (indicating that an absence of preclusive effect could deprive representative litigation of the quality needed to form the basis for a case).



compel such effect.<sup>284</sup> But the Court of Session's role as a court of original and final jurisdiction differs sharply from the situation in the United States, where widely dispersed courts of first instance may entertain initial proceedings and the federal government might litigate for years without securing a definitive resolution of an issue from the Supreme Court.<sup>285</sup>

The law of preclusion in the United States has been framed with this model of widely dispersed litigation in mind. Sitting atop a sprawling federal judiciary, the Supreme Court views its role as presiding over the uniform and effective enforcement of federal law; as a result, it frequently grants discretionary review to clarify (and unify) the law in the face of divisions in lower court authority.<sup>286</sup> By all accounts, the Court has come to view its task in explicating federal law as one that it performs more effectively when it has the benefit of a range of lower court authority.<sup>287</sup> So long as the Court views divisions in lower courts as an important prelude to its own involvement, the law of stare decisis and issue preclusion must leave the parties free to pursue their legal arguments without regard to prior decisions in other circuits. Otherwise, the stare decisis or issue-preclusive effect of the first circuit court decision to address a matter would settle it for the country as a whole. Such effective settlement would, in turn, place some pressure on the Supreme Court to grant immediate review. We can thus view both the "law of the circuit" doctrine as it has evolved in the lower courts and the rules of nonparty preclusion as outgrowths of

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284. Although stare decisis did not formally apply in Scotland, the Court of Session frequently relied on its prior decisions as authoritative resolutions of questions of law. *See supra* note 75.

285. Suits to challenge allegedly unconstitutional state actions will typically be brought in the federal district courts of the state in question; appeals typically proceed to the circuit court whose jurisdiction encompasses the state. Venue rules require the plaintiff to file suit against federal government officials either in the district where defendants reside, where substantial events occurred, or where plaintiffs reside. *See* 28 U.S.C. § 1391(e) (2012). Venue in the plaintiff's residence creates the prospect of widely dispersed litigation of claims against federal officers, although personal jurisdiction defenses may narrow the range of venues, at least in personal-capacity suits. *See* *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014) (refusing to permit a judge on the District of Nevada to assert personal jurisdiction over a federal official whose actions primarily occurred in Georgia).

286. *See* SUP. CT. R. 10(a)–(b) (identifying a conflict of circuit and state court authority on issues of federal law as a basis for granting discretionary review).

287. For a sophisticated treatment of the Court's use of discretionary docket control, *see* generally Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012). *See also* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 16–28 (2016) (discussing Supreme Court docket control as agenda-setting).

the Court's perception that some percolation of an issue in the lower courts should precede its ultimate decision of that issue.

Not surprisingly, then, the federal law of nonparty preclusion favors repeated litigation of the same issues of public law in the lower federal courts. For starters, the Supreme Court has made clear that, unlike private parties, the federal government cannot be subject to offensive nonmutual collateral estoppel when it loses an initial contest over the meaning of federal law.<sup>288</sup> In reaching that conclusion, the Court emphasized the geographic breadth of the government's litigation duties and the undesirable institutional consequences that would accompany a rule that froze into place the first adverse decision.<sup>289</sup> More recently, the Court rejected a lower court doctrine of "virtual representation" that would have broadened the scope of nonparty preclusion beyond traditional categories.<sup>290</sup> In *Taylor v. Sturgell*,<sup>291</sup> the Court concluded that the friend (and fellow antique aircraft enthusiast) of a party who lost an initial Freedom of Information Act (FOIA) suit against the federal government in the Tenth Circuit was not barred from pursuing a substantially similar claim in the District of Columbia Circuit.<sup>292</sup> As a nonparty to the first proceeding, the plaintiff in the second action was free to use the same lawyer to pursue his own claim for government documents in a different forum, where the law of the Tenth Circuit did not apply.<sup>293</sup>

Despite these ordinarily applicable rules, which bar nonparty preclusion in litigation with the federal government, one can see some signs that federal law may follow Scotland's lead in embracing wider nonparty preclusion for certain kinds of public actions. Some federal statutory schemes establish a first-to-file or coordination regime for citizen suits, thereby allocating litigation priority and lessening the risk

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288. See *United States v. Mendoza*, 464 U.S. 154, 155 (1984) (concluding that the government was not precluded from relitigating a legal issue that was resolved against it in an earlier proceeding with a different party); see also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735–53 (1989) (addressing the costs and benefits of nonacquiescence by federal administrative agencies after courts have rejected their positions in litigation).

289. See *Mendoza*, 464 U.S. at 160–61.

290. See *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) (disapproving of the doctrine of "virtual representation").

291. *Taylor v. Sturgell*, 553 U.S. 880 (2008).

292. See *id.* at 885.

293. See *id.* at 887–90 (describing the plaintiff's efforts to avoid the precedential effect of the earlier decision in the Tenth Circuit).

of duplicative litigation.<sup>294</sup> For example, the Clean Water Act and Clean Air Act authorize “any person” to bring suit against a polluter to collect civil penalties payable to the Treasury.<sup>295</sup> But in deference to the government’s primacy in enforcement, both of those statutes require citizen suitors to notify the government of their intent to file suit; the statutes bar the commencement of the proceeding if a federal or state agency “has commenced” and is “diligently” prosecuting a related action.<sup>296</sup> Similarly, the federal False Claims Act (FCA) requires that the government be notified of the commencement of a citizen’s action and authorizes the government to sue on behalf of that individual if it chooses to do so.<sup>297</sup> In the absence of government involvement, the FCA gives priority to the first informer suit filed and allows only one informer proceeding to be “pending” at any one time.<sup>298</sup> In these and other instances, Congress has authorized private citizens to pursue public actions and has taken steps to assure some coordination with government bodies to reduce the burden of duplicative litigation.

Nonparty preclusion would seem to follow naturally from such efforts by Congress to coordinate the litigation of public actions. Recall that the *Taylor* Court recognized an exception to its general rule, allowing the preclusion of nonparties under “special statutory scheme[s]” when the first action was brought “on behalf of the public

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294. Apart from authorizing suit broadly, the statutes require the plaintiff to notify the U.S. Department of Justice of the proposed commencement of an action and broadly authorize governmental intervention. *See, e.g.*, 42 U.S.C. § 7604(b)–(c) (2012).

295. *See id.* § 7604(a) (authorizing “any person” to file suit to enforce the Clean Air Act); 33 U.S.C. § 1365(a) (2012) (authorizing the same under the Clean Water Act).

296. 42 U.S.C. § 7604(b)(1)(B) (barring the commencement of a private suit under the Clean Air Act when the “Administrator or State has commenced and is diligently prosecuting” an enforcement action); 33 U.S.C. § 1365(b)(1)(B) (barring the same under the Clean Water Act). For a description of the statutory scheme, see *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174–75 (2000).

297. *See* 31 U.S.C. § 3730(b)(5) (2012).

298. The first-to-file rule of the FCA gives priority to the first person who files a claim and bars others from pursuing the same or related claims. *See id.* (“When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”). Although the Supreme Court declined to decide the claim-preclusive effects of the first-to-file rule on other, subsequent litigation, *see Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978–79 (2015), it has indicated that the United States must abide by the result of the first disposition, *see United States ex rel. Eisenstein v. New York*, 556 U.S. 928, 936 (2009) (noting that “the United States is bound by the judgment in all FCA actions regardless of its participation in the case”).

at large.”<sup>299</sup> To illustrate the idea, the Court referred to a decision of the Alabama Supreme Court which did not obviously control in the federal system.<sup>300</sup> Nonetheless, *Taylor* provides some authority in support of according nonparty preclusive effect to public actions (at least those brought on the government’s behalf with some measure of government oversight).<sup>301</sup> Certainly the federal courts have ascribed nonparty preclusion to prior litigation under the Clean Air Act, Clean Water Act, and FCA by barring some duplicative litigation.<sup>302</sup>

Scottish (and indeed Roman) practice teaches us that the prospect of nonparty preclusion necessarily invites closer attention to the manner in which one selects the individual, group, or agency that will pursue claims on behalf of the public. On the one hand, one might argue that the regime of nonparty preclusion reduces the threat of duplicative litigation and helps to justify some relaxation of standing requirements in environmental cases.<sup>303</sup> But public actions pose a threat both to defendants and to other potential plaintiffs whose rights may be undermined or compromised by inadequate representation of the public interest. In particular, the possibility of a collusive suit, brought to forestall genuine litigation, highlights the need to attend

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299. See *Taylor v. Sturgell*, 553 U.S. 880, 895 (citing *Richards v. Jefferson Cty.*, 517 U.S. 793, 804 (1996)).

300. See *Richards*, 517 U.S. at 804 (citing *Corprew v. Tallapoosa Cty.*, 241 Ala. 492, 494 (1941)).

301. See *Corprew*, 241 Ala. at 493–94 (describing the manner in which the relator action was designed to test entitlement to office).

302. See, e.g., *Sierra Club v. Two Elk Generation Partners, Ltd. P’ship*, 646 F.3d 1258, 1271–72 (10th Cir. 2011) (holding that a citizen suit under the Clean Air Act was barred by the state’s prior litigation of the alleged environmental violation); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473–74 (6th Cir. 2004) (holding the same under the Clean Air Act); *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 757–65 (7th Cir. 2004) (holding the same under the Clean Water Act). In finding preclusion, the decisions proceed on the assumption that the state agency, pursuing claims on behalf of the public, actually represented the individuals who later filed suits in federal court. See *Two Elk Generation Partners*, 646 F.3d at 1268–69 (holding that the state agency acted on behalf of the public in a *parens patriae* suit); *Friends of Milwaukee’s Rivers*, 382 F.3d at 757 (same). The cases do not address the degree to which prior litigation by one member of the public would bar a later action by the government, although the model of providing the government with notice and an opportunity to intervene appears to contemplate the government’s preclusion. Compare *In re Schimmels*, 127 F.3d 875, 882 (9th Cir. 1997) (holding that the government was in privity with a *qui tam* relator under the FCA and bound by the relator’s unsuccessful suit against a debtor), with *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 456 (5th Cir. 2005) (holding that the government is not bound by a relator’s suit when it is dismissed at the pleading stage).

303. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (arguing that a somewhat reduced showing of injury was sufficient to support litigation in the environmental context).

carefully to the identity of the public's champion and to deny effect to judgments (or settlements) obtained after friendly or collusive litigation.<sup>304</sup> These sorts of worries help to explain the institutional preference for public control of public actions, exercised by politically responsible government officials who have the resources to pursue claims effectively and responsibly.<sup>305</sup> Similar worries may support arguments for congressional primacy in defining both the right of citizens to mount public actions and the preclusive effect accorded to such proceedings.<sup>306</sup>

If Congress were to take the lead, it might do so by relying to some extent on the model of the federal class action.<sup>307</sup> As a procedural tool for ensuring the plaintiff's ability to represent the interests of the class and for protecting the defendant from duplicative litigation, Rule 23 works reasonably well.<sup>308</sup> Before a class can be certified, Rule 23 calls for an assessment of the adequacy of the class representative (and attorney), precisely the sort of inquiry Congress might demand before

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304. Under the Clean Water Act, state enforcement proceedings may bar later enforcement proceedings only where they have been diligently pursued. *See, e.g., id.* at 167 (noting that the district court refused to treat an apparently collusive settlement between a state agency and citizen as a bar to later litigation); *Friends of Milwaukee's Rivers*, 382 F.3d at 757 (emphasizing that diligence is key to preclusion). In the courts of England, collusive suits did not bar a subsequent action by a genuine adversary to recover an informer's penalty. *See* 3 BLACKSTONE, *supra* note 16, at \*162 (observing that, although the first-filed informer suit had priority, a collusive suit would not bar subsequent relitigation).

305. *See* Beck, *supra* note 41, at 575–85 (describing the problems with informer litigation in England); Woolhandler & Nelson, *supra* note 13, at 701–04, 725–32 (explaining how, after problems with the private enforcement of public rights, informer suits came under attack in the United States and gave way to a model of public agency enforcement).

306. Because the resolution of public claims can affect the rights of both defendants and unrepresented plaintiffs, due process may impose limits on Congress's dispensation. *See* *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). *See generally* Davis, *supra* note 46, at 619–21 (discussing the day-in-court ideal and the interests of unrepresented class members).

307. On the particulars of class certification, *see* FED. R. CIV. P. 23. For a summary of the factors that have made class actions a controversial fixture on the Supreme Court's docket, *see* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 13–16 (1996). *See also* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056–57 (1996) (identifying the reverse auction, universal venue, inadequate representation by class counsel, and state court particularism as the problems underlying the calls for reform which eventually led to the enactment of the Class Action Fairness Act of 2005).

308. On the preclusive effect of the refusal to certify a Rule 23(b)(3) class action, *see* *Smith v. Bayer Corp.*, 564 U.S. 299, 318 (2011). *See generally* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005) (exploring the many connections between the calculus underlying the certification of class actions and the preclusive effect of the court's later judgment).

allowing a private party to litigate on behalf of the public as a whole.<sup>309</sup> What's more, Rule 23 requires the court to review the adequacy of any settlement, thus helping to weed out collusive deals.<sup>310</sup> Finally, Rule 23 offers a measure of repose to defendants; win or lose, the judgment in a class action bars future litigation of the same claims by adequately represented members of the certified class.<sup>311</sup> Such an approach would implement the key insight of Scots' law: that standing to pursue public actions necessarily entails an analysis of nonmutual preclusion.

*B. Scotland and Standing Law in the United States*

Apart from the particular lessons Scots law can teach about the interplay of standing and preclusion, its approach to regulating the right to sue may well shed comparative light on the origins of standing law in the United States. One view holds that the Supreme Court during the New Deal era essentially invented the doctrine. Thus, Judge William Fletcher has traced the creation of a "separately articulated and self-conscious law of standing" to the "growth of the administrative state" and an increase in litigation aimed at "articulat[ing] and enforc[ing] public, primarily constitutional, values."<sup>312</sup> Winter similarly finds that the law of standing was fashioned in the twentieth century "largely through the conscious efforts of Justices Brandeis and Frankfurter."<sup>313</sup> Such leading scholars as Cass Sunstein, Robert Pushaw, and Evan Lee also attribute standing law to

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309. See FED. R. CIV. P. 23(a) (requiring the court to ascertain if the class representative will adequately represent the class, assert claims that are typical of those of the other class members, and press the claims on behalf of the interests of the class without any conflict of interest). See generally Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 958–62 (2004) (cataloging factors that inform adequacy of representation and including the quality and experience of class counsel). This more searching inquiry into representational adequacy would seem appropriate in circumstances where nonmutual preclusive effect attaches to the judgment in a public action.

310. See FED. R. CIV. P. 23(e) (requiring courts to evaluate the fairness of any proposed settlement). See generally *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (rejecting the proposed class action settlement).

311. Of course, the key to repose lies in the adequacy of representation, a concept rooted in due process. See *Hansberry v. Lee*, 311 U.S. 32, 44–45 (1940) (permitting a class member to attack a prior class action decree in which class conflicts precluded adequate representation); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 432–40 (2000) (supporting the use of collateral attack to ensure fair treatment of class members).

312. Fletcher, *supra* note 42, at 225; cf. JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 55 (1978) (observing that the term "standing" entered into common usage in the twentieth century).

313. Winter, *supra* note 10, at 1374.

the evolving demands of the twentieth century rather than to anything inherent in Founding-era conceptions of the judicial power.<sup>314</sup>

Other scholars find greater continuity with the past. Woolhandler and Nelson, for example, find substantial support in history for the emergence of standing doctrine.<sup>315</sup> Looking mainly to English sources and developments in the courts of the United States, Woolhandler and Nelson identify a variety of standing-like limits on the judicial power of the federal courts dating from the nineteenth century. On their telling, not only did American courts mainly decline to hear public actions and other forms of relator or informer litigation, but the Supreme Court also suggested that at least some of the relevant standing limits were of a constitutional dimension.<sup>316</sup> Woolhandler and Nelson thus defend the idea that private litigation, with attendant limits, provides the model for federal adjudication. And they question the degree to which the recognition of certain homegrown exceptions, such as mandamus, prohibition, and relator litigation, establishes a general principle that Congress is free to permit private plaintiffs to enforce public rights. In their view, public rights are the province of government enforcement, and the Court properly declines to allow private citizens to perform this enforcement function.<sup>317</sup>

The experience of the Court of Session introduces new ideas to the debate over standing's origins and legitimacy as constitutional law. The Scots held fast to the requirements of title and interest to sue in private litigation, even as they embraced some forms of public law litigation.<sup>318</sup> The Scots' experience thus provides some support for both sides of the standing debate. Title and interest appear to derive from civil law ideas and bear some resemblance to the constructs (more familiar to scholars in the United States) of *injuria* and *damnum*.<sup>319</sup> The notion that courts sit to hear claims of right that implicate the pecuniary or other legally recognized interests of private claimants has roots deep in the Western conception of a tribunal of justice and provides a natural foundation for the doctrine of standing.<sup>320</sup>

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314. See Lee, *supra* note 11, at 625; Pushaw, *supra* note 11, at 458–63; Sunstein, *supra* note 10, at 176.

315. See Woolhandler & Nelson, *supra* note 13, at 690–92.

316. *Id.* at 718–21.

317. *Id.* at 723–25.

318. See *supra* Part I.B.

319. See Woolhandler & Nelson, *supra* note 13, at 719 n.146.

320. By characterizing the essential feature of the plaintiff's complaint as a claim of right, I am rather self-consciously declining to frame the problem of justiciability in terms of the presence

At the same time, the Court of Session's recognition of the Roman-law *actio popularis* or public action provides strong support for those who argue that rigid adherence to the private model of standing too narrowly limits the enforcement of commonly held rights.<sup>321</sup> The Court of Session seems to have made a practical judgment in allowing such actions to proceed over the objections of those like Kames who contended that alternative remedies were sufficient. As the court explained in *Herriot's Hospital*, the current magistrates were unlikely to hold their predecessors to account and were unlikely to do so in a way that would prevent the loss of a valuable property. Oversight by the Court of Exchequer, though proper to ensure review of public accounts, could not address specific instances of official malfeasance.<sup>322</sup> Hence the necessity for the recognition of a public action—otherwise, there was too great a risk of a failure of justice.

The intermediate approach apparently adopted in Scotland allows for a somewhat more nuanced assessment of the fortunes of bounty-driven public actions in England and the United States. Woolhandler and Nelson accurately report that bounty-driven public actions had grown controversial, in part due to the incentive effects that bounties created for the excessive and sometimes scurrilous enforcement of penalty statutes.<sup>323</sup> Similar concerns led Kames to criticize the public action in Scotland and to argue that it should be limited to claims brought pursuant to an act of Parliament.<sup>324</sup> Woolhandler and Nelson conclude, sensibly enough, that the historical criticism of bounty-driven informer actions makes *qui tam* litigation a less appealing

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of a live dispute between opposing parties. A substantial body of evidence supports the conclusion that a claim based on federal law, even an uncontested petition for naturalized citizenship, is sufficient to bring the judicial power of the United States into play, at least in cases arising under federal law. See Pfander & Birk, *Non-Contentious Jurisdiction*, *supra* note 19, at 1359–91 (describing the wide range of instances in which Congress has assigned the federal courts jurisdiction over uncontested applications to register claims of right).

321. See *supra* note 10 (collecting authority).

322. See *supra* note 133 and accompanying text. For an argument that the Supreme Court should administer a body of standing law that allows individuals to pursue commonly held constitutional claims, see Pushaw, *supra* note 11, at 485. Pushaw thus urges the Court to abandon its individualized injury standard as applied to alleged government violations of constitutional provisions that either protect collective rights (such as the Establishment Clause) or structure the government (such as Articles I and II, including provisions like the Incompatibility Clause and the Ineligibility Clause). *Id.* at 487–89.

323. See Woolhandler & Nelson, *supra* note 13, at 725–32.

324. See *Lang v. Magistrates of Selkirk* (1748) ScotCS, in KAMES, *supra* note 143, at 184 (arguing that Scotland should follow Europe in laying aside the *actio popularis* except as “directed by particular statutes”).



foundation on which to predicate modern arguments for reliance on private litigants to enforce public duties.<sup>325</sup> But the Scots' intermediate approach reveals that a legal system can curtail bounty-hunter actions, while retaining a different form of the *actio popularis* to allow individuals to enforce commonly held public rights against public bodies. The selective practice of the Court of Session offers a modern justification for the public action that the bounty-hunter problems do not undercut.

The experience in Scotland may also offer new insights into the rise of the standing doctrine in the United States. The Court of Session in the eighteenth century enjoyed broad equitable power. It could issue declaratory judgments at the behest of any litigant who sought a clarification of her legal rights, and it could entertain suits that challenged the legality of government action. Because each of these elements of practice were implicated in the decision of the Court of Session to recognize the right of private individuals to enforce public rights, they helped to shape the role of the court in *actio popularis* proceedings. Similar factors may have spurred the development of standing law in the United States, as part of the shift from private law to public law litigation<sup>326</sup> that, in the oft-quoted words of Justice Frankfurter, transformed the federal courts into "powerful reliances for vindicating every [federal] right."<sup>327</sup>

Recognition of the officer suit, coupled with general federal question jurisdiction, played a crucial role in the rise of standing law. *Ex parte Young* recognized that suits against officers did not run afoul of the Eleventh Amendment and did not require separate congressional authorization in the form of a federal statute expressly conferring a right to sue.<sup>328</sup> The decision thus opened the door to

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325. See Woolhandler & Nelson, *supra* note 13, at 725–32.

326. As noted in the Introduction, the federal courts were given a general grant of federal question jurisdiction in 1875, and they gained the power to enjoin government officials from committing ongoing violations of federal constitutional law in *Ex parte Young*, in 1908. See *supra* note 53. Additionally, the federal courts were empowered to entertain declaratory-judgment proceedings in 1934. See Declaratory Judgment Act, Pub. L. No. 73-343, 48 Stat 955 (1934) (codified as amended at 28 U.S.C. § 2201 (2012)).

327. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (quoting FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928)). See generally Monaghan, *supra* note 49, at 1368–71 (emphasizing these elements of federal judicial authority as defining the special function or public law model of law declaration).

328. *Ex parte Young*, 209 U.S. 123, 167 (1908). The decision has been conventionally understood to establish two principles, that the railroad has a right to sue to enjoin the state attorney general in his official capacity from enforcing unconstitutional rates and that such an

actions in equity brought to challenge government action taken by both state and federal officials.<sup>329</sup> Much of the early litigation in which the Court struggled with standing doctrine arose in connection with open-ended applications for injunctions against allegedly unlawful or unconstitutional government actions. In *Frothingham v. Mellon*,<sup>330</sup> an individual taxpayer sought to enjoin federal expenditures under a federal spending statute that was said to violate the Tenth Amendment;<sup>331</sup> in *Fairchild v. Hughes*,<sup>332</sup> the plaintiff brought a bill in equity to block the implementation of the Nineteenth Amendment, which gave women the vote.<sup>333</sup> Both cases involved suits to address what the Court described as the “right, possessed by every citizen, to require that the government be administered according to law.”<sup>334</sup> In both cases, the Supreme Court declined to permit the action to proceed.

Scholars agree that these decisions played a central role in the eventual formulation of modern standing law.<sup>335</sup> But they disagree as to when the Court formally constitutionalized the law of standing and what causative factors played a role in the decision to do so. Winter contends that *Frothingham* laid the foundation for a body of constitutional law that came later and identifies a variety of factors as elements in the transition, including judicial ideology and the power of metaphor.<sup>336</sup> Bellia argues that the promulgation of the Federal Rules of Civil Procedure in 1938 may have hastened the arrival of standing law, as litigants shifted away from the common law forms of pleading to embrace the idea of a claim for relief under applicable law.<sup>337</sup> Under this more open-ended pleading regime, Bellia argues, the forms of

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officer suit does not violate the Eleventh Amendment as one against the state. See FALLON ET AL., *supra* note 3, at 927.

329. For applications of *Ex parte Young* to federal officers, see FALLON ET AL., *supra* note 3, at 892.

330. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

331. *Id.* at 479–80.

332. *Fairchild v. Hughes*, 258 U.S. 126 (1922).

333. *Id.* at 127.

334. *Id.* at 129.

335. See, e.g., Winter, *supra* note 10, at 1443–47 (discussing *Fairchild* and *Frothingham* at some length).

336. See *id.* at 1444–47 (comparing the Court’s reasoning in *Frothingham* to “the modern doctrine of standing”).

337. See Bellia, *supra* note 49, at 825–27 (“Standing did not emerge as a question distinct from whether the plaintiff had a cause of action under a recognized form of proceeding until the merger of law and equity in the federal system and the adoption of the Federal Rules of Civil Procedure.”).

action could no longer perform their traditional office in restricting recovery to plaintiffs who had articulated recognized forms of legal injury.<sup>338</sup>

True enough, but the pressure to articulate rules of standing may have come earlier still. Although it remains a topic of frequent exploration, most scholars agree that *Ex parte Young* broadened the scope of relief available for threatened constitutional violations by government officials.<sup>339</sup> While past decisions had allowed suits to enjoin threatened invasions of property rights,<sup>340</sup> the action recognized in *Ex parte Young* allowed a suit to block the non-tortious enforcement of state law. The decision thus broadened the scope of federal judicial intervention to encompass a new category of constitutional violations and thus went beyond the traditional role of courts of equity in granting antisuit injunctions.<sup>341</sup> After *Ex parte Young*, litigants began to mount direct, affirmative constitutional claims by relying on the officer suit model that the Court had confirmed there. Only two years later, in 1910, a senator from North Carolina reported with some misgivings that there had already been “150 cases of this kind . . . where one

338. See *id.* at 826 (“[W]hile before the merger of law and equity the question of standing was indistinct from the question whether the plaintiff had a recognized cause of action for a judicial remedy, there were significant limitations on the forms of proceeding (and, thus, causes of action) that were available to non-injured-in-fact persons.”).

339. See, e.g., FALLON ET AL., *supra* note 3, at 927 (noting that the decision recognized a new right to sue for injunctive relief under the Fourteenth Amendment in circumstances in which state officials’ expected conduct was likely not tortious at common law, thus opening up a new field for federal judicial intervention); cf. Monaghan, *supra* note 245, at 1826–30 (inclining toward an account of *Ex parte Young* that emphasizes federal equity, rather than the Constitution, as the source of the right to sue).

340. See *Osborn v. Bank of the U.S.*, 22 U.S. 738 (1824) (permitting the bank to seek an injunction against state officers’ trespassory taking of bank assets).

341. One scholar argues that *Ex parte Young* can be explained as doing little more than updating an old standard, the antisuit injunction. See generally John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2010) (arguing that *Ex parte Young* does not recognize an implied right of action but rather relies on an established and limited corollary to the antisuit injunction). But *Ex parte Young* did not fit within the antisuit category; it was an action to restrain a criminal prosecution (thus falling outside equity’s concurrent jurisdiction) and it did not address the established categories of antisuit interposition: fraud, mistake, and accident. See 1 POMEROY, *supra* note 205, §§ 139–40, at 191–94 (identifying the courts’ refusal to recognize defenses of fraud, mistake and accident as the cornerstone of equity’s perception that law’s remedial inadequacy necessitated the antisuit injunction); 2 STORY, *supra* note 205, § 1198, at 562 (affirming that not every defense would support an antisuit action in equity but only those based on fraud, mistake, and accident, where the court of law does not recognize the defense). Instead, *Ex parte Young* was apparently regarded (in keeping with the conventional wisdom) as opening up a new field of equitable intervention to restrain threatened constitutional violations. See generally Pfander & Dwinnell, *supra* note 254, at 211–14 (criticizing Harrison’s account as inconsistent with contemporary conceptions of the antisuit injunction).

Federal judge had tied the hands of the state officers, the governor, and the attorney general.”<sup>342</sup>

As members of Congress pressed for legislation to restrict the *Ex parte Young* remedy,<sup>343</sup> the Court felt some pressure to adopt limiting measures of its own. One can see in *Fairchild*, as early as 1922, an effort on the Court’s part to give voice to constitutional concerns with the potential breadth of unbounded injunctive relief. There, the Court specifically found that, although the bill sought equitable relief to compel the government to administer its affairs in accordance with law, it was “not a case within the meaning of § 2 of Article III of the Constitution.”<sup>344</sup> Forced to confront the model of litigation it had recognized in *Ex parte Young*, the *Fairchild* Court seems to have undertaken a search for a set of limits on the power of the individual to challenge government action by citizen suit. That it felt moved to articulate *constitutional* limits may reflect the fact that the *Ex parte Young* Court had treated the Constitution as a key factor in its recognition of the right to sue.

### C. *On the Need for a Threshold Body of Standing Law*

Apart from the Scots’ embrace of a public–private distinction in defining standing to sue, the Scottish experience explains how a concern with preclusion translates into the use of standing law as a threshold, non-merits test of the viability of particular claims and claimants. Some form of threshold inquiry enables the defender to contest title and interest and thereby ensure that any favorable decree effectively shields the defender from a second or third round of litigation. While the threat of such duplicative litigation in the private law context must have been negligible, the threat was far more real in the context of public actions. There, many pursuers could bring an

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342. Barry Friedman, *The Story of Ex parte Young*, in *FEDERAL COURTS STORIES* 247, 270 (Vicki C. Jackson & Judith Resnik eds., 2010) (quoting Senator Overman).

343. See FALLON ET AL., *supra* note 3, at 1089 (describing various legislative responses to *Ex parte Young*’s storm of controversy).

344. *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922). The Court’s constitutional intentions can be seen both in its reference to the text of Article III and in its reliance on *In re Pacific Railway Commission*, 32 F. 241 (N.D. Cal. 1887), which was perhaps the earliest indication that the terms “cases” and “controversies” have similar meanings and impose limits on the federal judicial power. For a discussion of the significance and novelty of *Pacific Railway Commission*, see Pfander & Birk, *Non-Contentious Jurisdiction*, *supra* note 19, at 1421–22. For a similar conclusion as to the constitutional basis of the decision, see EVAN TSEN LEE, *JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED* 40–41 (2011).

action to assert the same claim of right, threatening the defender with a string of suits. A threshold inquiry into title and interest, coupled with the extension of preclusive effect to the decree in the first such public action, would obviate the threat of endless relitigation. Meanwhile, the merits would remain open to resolution in a subsequent action if the initial pursuer was said to lack the requisite title and interest to pursue.<sup>345</sup>

The prospect of downstream preclusion, particularly in public actions, provides a possible justification (so far missing from the legal literature) for distinguishing the inquiry into standing from that into the merits. If, as some scholars have suggested, the Supreme Court were to treat the standing inquiry as part of an assessment of whether the plaintiff has a claim for relief under the applicable law,<sup>346</sup> then a refusal to permit a particular plaintiff to sue would represent a merits-based disposition to which preclusive effect would ordinarily attach.<sup>347</sup> To be sure, under the general rules of nonparty preclusion in the United States, such an individual merits determination would have no impact on the ability of *other* plaintiffs to mount their own claims.<sup>348</sup> But if preclusion law in public actions were to evolve along the lines suggested by the Scottish example, nonparty preclusive effect could conceivably attach to the first public action that proceeded to a judgment on the merits. To the extent that such an initial disposition is based on the first pursuer's representational inadequacy, a merits-based conception of the denial of standing could prevent a more adequate representative from later mounting her own claim. In situations where nonparty preclusion could result, we might do well to

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345. For authority supporting the ideas explored in this paragraph, see sources cited *supra* Part II.A.3.

346. See Currie, *supra* note 208, at 41 (arguing that the right to sue should be derived from the "constitutional or statutory provision on which the claim rests" (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))); Fletcher, *supra* note 42, at 239 ("The essence of a standing inquiry is thus the meaning of the specific statutory or constitutional provision upon which the plaintiff relies rather than a disembodied and abstract application of general principles of standing law.").

347. Under modern procedural systems, with liberal rules for the amendment of complaints, preclusive effect ordinarily attaches to a dismissal for failure to state a claim upon which relief may be granted. See *Rinehart v. Locke*, 454 F.2d 313 (7th Cir. 1971) (finding that an order of dismissal for failure to state a claim, which does not specify that dismissal is without prejudice, "is res judicata as to the existing claim"); RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. d (AM. LAW INST. 1982).

348. See *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) (allowing a plaintiff to proceed with his claim, despite the fact that his friend had previously unsuccessfully attempted to bring a very similar claim).

maintain a distinction between the inquiry into standing or representational adequacy and the merits of the claim.

The Supreme Court's treatment of preclusion and representational adequacy in the context of class action litigation brings these lessons home. In *Smith v. Bayer Corp.*,<sup>349</sup> the Court held that a federal court's refusal to certify a class did not preclude absentee members of the putative class from later seeking certification of the same class in a different forum.<sup>350</sup> As the Court explained, "only parties can be bound by prior judgments," except in special situations.<sup>351</sup> But absentee class members do not become parties to a class action until the representational adequacy of the named plaintiff has been confirmed and the class has been certified; denial of certification, by definition, means that the absentees remain nonparties, free to pursue a remedy on their own behalf for a violation of their rights.<sup>352</sup> Otherwise, as the Court explained, preclusion would create a regime of virtual representation of nonparties comparable to that it had rejected in *Taylor v. Sturgell*.<sup>353</sup> The lesson seems entirely straightforward: downstream preclusion of public claims calls for an upstream assessment of representational adequacy or standing, a lesson that the Scottish Court of Session learned in the course of assessing title and interest to sue in public actions.

### CONCLUSION

Facing a series of challenges in the eighteenth century that the courts of the United States would not fully confront for several decades, the Scottish Court of Session constructed a body of public law that included broad power to entertain public actions for declaratory relief against government actors. The Court of Session's response anticipated that of the Supreme Court: it required title and interest to pursue private litigation even as it relaxed those rules to permit some public actions to proceed. One of the public actions, the *actio popularis*, persisted despite criticisms of its potentially expansive scope. Reflecting the Court of Session's perceived obligations as a court of equity, it enabled the court to provide a remedy for threatened

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349. *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

350. *Id.* at 302.

351. *Id.* at 313.

352. *Id.* at 312–15.

353. *Id.* at 315 (quoting *Taylor*, 553 U.S. at 885). For a discussion of this aspect of *Taylor*, see *supra* Part II.A.3.

violations of law that might otherwise have evaded effective judicial oversight. The same qualified impulse toward ensuring a forum for claims of illegality underlies the Supreme Court's struggle with modern citizen suits and taxpayer actions.

A source of surprising insights, the Scots' experience with the *actio popularis* provides a variety of lessons. For starters, standing issues have a timeless quality as high courts struggle to articulate limits on an otherwise boundless jurisdiction. That struggle began in earnest in the United States after *Ex parte Young*, and it continues to this day. What's more, the Scots' concern with repose and preclusion helps to explain the need for a threshold, non-merits (but not necessarily jurisdictional) inquiry into the pursuer's right to sue. In the United States, the connection between standing and nonparty preclusion has been obscured by an institutional reluctance, as restated in *Taylor v. Sturgell*, to restrict an individual's right to sue. But one can see the connection in federal laws that authorize or restrict citizen-suit litigation by ascribing nonmutual preclusive effect to denials of the claims of the first individual suitor.

True, the Scots' approach to standing law does not appear to have shaped developments in the United States. But we may still have something to learn from the balanced approach that the Court of Session adopted. Drawing from Roman law, the court relaxed the strictures of title and interest to sue in order to recognize the *actio popularis*. It did so over the objections of one of the great jurists of the eighteenth century, Kames, who would have limited standing to those with a "lucrative" interest.<sup>354</sup> Some two centuries later, Justice Scalia put forward a strikingly similar objection to taxpayer standing in the United States, proposing to limit standing to those with "Wallet Injury."<sup>355</sup> One can learn much about the timeless quality of the challenges posed by public law litigation by considering the similarity of the Kames and Scalia objections. One can also learn much from the decision of their respective peers to reject the Kames and Scalia view. The Scottish version of the *actio popularis* and the American version of the public action rest on a shared perception that private suitors with no distinctive injury can sometimes play an indispensable role in clarifying the legal obligations of public institutions.

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354. See *supra* note 1 and accompanying text.

355. See *supra* note 2 and accompanying text.